

The International Criminal Court: A Judicial Institution with a Room for Politics

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Abstract

The International Criminal Court is generally viewed to be a great achievement of international law. The fact that it is the first permanent international judicial institution recognizing individual responsibility for a number of the most horrific international crimes, added to the significance of the Court. However, like any other judicial institution, independence from the influence of other bodies is integral to its efficiency, legitimacy and credibility. In this regard, the relationship between the International Criminal Court and the Security Council has always been a subject of debate. This article discusses the relationship between the Security Council and the International Criminal Court. In doing so, it analyses the impact of the Council's Court-related powers on the independence of the Court, and the implications of such powers on its integrity and credibility as a judicial institution. The article seeks to illustrate the damaging impact such relationship might potentially have on the Court, and the need for reforms that address and deal with such impact in order to achieve and maintain a sense of equality and fairness within the international community towards the operation of the Court, which is integral to the efficiency of its jurisdiction and even its existence as an international judicial institution.

Keywords: International Criminal Court, Security Council, Referral, Deferral, Jurisdiction, Independence

1. Introduction

The end of the Cold War allowed the Security Council to respond more actively to international security threats, as the tit for tat situation between the Eastern and Western camps in the Security Council during this period restricted its role significantly (Almqvist, 1). The end of the Cold War stage did not only affect the efficiency of the Security Council's role, but also the concept of international peace and security, which is the main focus of the Council (1). During that period there was a decline in inter-state conflicts, which had been regarded as the traditional threat to international peace and security.

In return, an escalation in internal conflicts was taking place, involving non-state actors and affecting civilians as the main targets in many instances (4). Such change prompted the Security Council to adjust its understanding to the concept of "peace and security threat" to include, in addition to the classical inter-state conflicts, a wider recognition of acts such as internal conflicts, civil wars, genocide and other large-scale atrocities, and terrorism as potential threats to international peace and security (A More Secure World, 2004).

In this regard, the Security Council has come to recognize on several occasions that large-scale atrocities constitute security threats that activate its mandatory powers under Chapter VII of the United Nations Charter to act in response to such crimes and apply individual liability on those responsible through international criminal judiciary, in what is considered as a dissenting direction from the concept of state liability, which has always governed the interactions of international relations and the legal framework of international law (Almqvist, 4).

The new dimension of the Security Council's jurisdiction witnessed its creation to *ad hoc* international criminal tribunals for the Former Yugoslavia and Rwanda, its request to the United Nations Secretary General to establish hybrid tribunals in Sierra Leone where the latter was to create an independent special court and express its readiness to act upon the report of the Secretary General, and its orders in Kosovo and East Timor to assign international judges and prosecutors within the existing national judicial system (6-7).

The Security Council's resource to criminal justice and criminal sanctions to deal with the new kind of threats to international peace and security came as a result to a growing evidence of inefficiency of the collective nature of the classical measures utilized by Chapter VII of the Charter in dealing with the individualism of this kind of threats (Koskenniemi, 1870-1969). Even individually imposed asset freeze by the Council could be considered as a disregard to the basic requirements of international human rights law in that it deprives those who have been accused of being responsible for those crimes from the rights of a due process (Cameron, 159). Therefore, the individual nature of those crimes makes it more rational to employ a credible judicial process as an instrument to impose individual sanctions.

The rationale of international criminal justice enjoyed a degree of international enthusiasm that prompted the United Nations to support the efforts to establish a permanent international criminal court (Schabas, 2). Despite the reluctance of some permanent members in the Security Council that such court could potentially limit their powers and threaten their ability to deal with issues of international peace and security, the Permanent International Criminal Court (ICC) emerged from the Rome Conference of 1998 as an independent international criminal court and became operational on 1 July 2002 (Bosco, 39-40).

The ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression, which were described in both the preamble and articles of the Rome Statute as “the most serious crimes of concern to the international community as a whole”. In order to exercise its jurisdiction, the state of which its territory was subject to the crime or the state whose national committed the crime must be party to the Rome Statute of the ICC or have accepted its ad hoc jurisdiction (Mistry & Verduzco, 3).

The ICC is also enabled to exercise its jurisdiction under article 13(b) of the Statute through a referral by the Security Council over situations that relate to its powers under Chapter VII of the United Nations Charter (3). The referral by the Security Council to the ICC came as a result of the compromise reached in the Rome Statute that sought to accommodate the role of the ICC that is responsible for judicially dealing with crimes that could potentially affect international peace and security, and the Security Council as the primary body responsible for the maintenance of international peace and security, taking into consideration the concerns of the Security Council over the impact of the ICC on its powers and functions in international security issues (3).

In this regard, the ability of the Security Council to refer situations to the ICC under its powers in Chapter VII of the United Nations Charter was a compromise between those who wanted complete independence for the Court that is not influenced or affected by the politics of the Security Council, and those who viewed crimes subject to the jurisdiction of the ICC as potentially closely connected with the Security Council’s mandate in issues of international peace and security, entitling the latter to have control over the work of the ICC (3).

This article examines the international criminal justice system represented mainly by the ICC, and the degree in which such system has satisfied the principle of judicial independence, considering its relationship with the Security Council and the political impact, viewed by many, that such relationship could potentially have on the supposedly pure judicial nature of the system.

2. The political interference of the Security Council in international criminal justice through *ad hoc* criminal tribunals

As discussed above, despite the fact that the ICC was established as the first permanent international criminal court, international criminal justice was represented through a number of *ad hoc* international criminal tribunals that were established to deal with specific cases of criminal atrocities. The Security Council is viewed by many to have utilized its powers under Chapter VII of the United Nations Charter to consolidate its role and dominance on the international stage. In doing so, it has not limited its resort to the use of targeted sanctions and military intervention, but also managed to capture the essence of the broadening concept of international peace and security to employ international criminal justice to cement its dominance.

In this context, the Security Council utilized Chapter VII not only to create judicial bodies, such as the case with the International Criminal Tribunal of Yugoslavia and the International Criminal Tribunal of Rwanda, but also participated in the appointment of international judges and prosecutors, shaping of general operational policies, and their funding (Almqvist, 6). The political influence imposed on the jurisdiction of temporal criminal tribunals established through a Security Council arrangement under Chapter VII of the United Nations Charter is evident in the restrictions associated with their mandate.

The Special Court of Sierra Leone provides a good example of such politically motivated restrictions, where it was excluded from its jurisdiction potential crimes of members of international peace-keeping forces and other foreign operations unless an authorization is granted by the Security Council for such jurisdiction (7-8). Such restriction is viewed by many as a protection to nationals of the Security Council’s major powers from the investigation or prosecution of international criminal body regardless to whether they were involved in the concerned crime or not. This example clearly indicates the negative impact a political body like the Security Council could have on the integrity of the international judicial justice system.

Another case of political influence exercised by the Security Council over an international criminal tribunal is clearly shown in the Special Tribunal for Lebanon, which was established to investigate and prosecute the persons responsible for the attack that resulted in the death of former Lebanese Prime Minister Rafiq Hariri. The Statute of the Tribunal restrictively controlled the jurisdiction of the tribunal to a degree that deprived it from the right to decide who will stand trial before it.

Such political restriction over the jurisdiction of an international judicial tribunal was widely criticized to a degree that the Secretary-General himself expressed his dissatisfaction by stating:

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 no 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 connected attacks could cast a serious doubt on the objectivity and impartiality of the tribunal and lead to the perception of selective justice (Report of the Secretary-General, (S/2006/893), 15 November 2006).

The rationale that could be used to explain the subordinate relationship between the Security Council and *ad hoc* tribunals, which is based on the idea that the temporary nature of such tribunals adds legitimacy on the United Nations Security Council's mandate to establish and regulate them as they both deal with matters that potentially fall within the scope of international peace and security; falls short to justify the relationship between the Security Council and the Permanent International Criminal Court. In fact, such relationship, which was regulated by the Rome Statute of the ICC, has been criticized for allowing the politics of international relations, represented by the Security Council, to interfere in the pure judicial nature of an independently established court with a legal framework regulated by an international treaty.

3. Analysis of the relationship between the Security Council and the ICC

To understand such criticism and analyze it, it is relevant to start with outlining the nature of such relationship. The relationship between the Security Council and the ICC is specified in Article II of the Relationship Agreement that 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 responsibilities of the United Nations under the Charter.
- (3) The United Nations and the Court respect each other's status and mandate.

3.1. The scope of the relationship

The Rome Statute grants the Security Council two roles that it is entitled to exercise in its relationship with the ICC. It has the authority of "referral" for a situation of which one or more crimes of those listed in the Statute is presumed to have been committed in any state regardless to whether such state is a party to the Rome Statute or not. The Security Council exercises this role out of its determination that international peace and security is being threatened under its powers granted by Chapter VII of the United Nations Charter (Kocar, 173).

In this context, the Rome Statute's choice of allowing the Security Council to refer a situation to the Court instead of a specific crime or criminal is commendable, as it takes into consideration the inalienable right of the Court to conduct its judicial assessment and legal characterization of the act subject of referral.

The Security Council makes the decision to refer a situation by a positive vote of nine members that includes the concurring votes of the veto-power members. The prosecutor of the ICC has the right to decide not to proceed with the referred situation if he/ she deems that there is a lack of judicious basis to proceed, and inform the Pre-Trial Chamber of the Court of his/ her decision (173). However, the Chamber may review the decision of the prosecutor if the Security Council requests it to do so (Calvo-Goller, 159).

The second role granted to the Security Council as part of its relationship with the ICC regulated by the Rome Statute is the right of deferral. Article 16 of the Statute gives the Security Council the power to decide, under its authority of Chapter VII of the United Nations Charter, to defer the commencement or proceeding of an investigation or prosecution for a renewable period of 12 months, when it determines that the initiation or continuation with the Court jurisdiction would undermine peace and security. As it is the case with referrals, the deferral resolution is subject to the veto consideration of the Security Council's decision-making mechanism (Couture, 12; Kocar, 176).

3.2. The relationship and the concept of 'judicial independence'

The role that the Security Council plays in the jurisdiction of the International Criminal Court could be viewed as part of its continuing effort to solidify its dominance on the international stage. The interference of the Security Council in the establishment, and sometimes the jurisdiction, of *ad hoc* international criminal tribunals may have its reasonable rationale for some. However, having a political body like the Security Council practicing particular roles over an independent international criminal court, which was created by an international treaty that is not part of the United Nations organizational and treaty structure, is subject to criticism as it is viewed by many to violate the structured principle of judicial independence, which leads in turn to having a detrimental effect on the judicial integrity of the judicial body in question, which is in this case the ICC.

When appraising the judicial independence of the ICC from the Security Council's influence, it is important to determine first the scope of the concept of "judicial independence" and the elements constituting its existence in the international context (Almqvist, 12).

In the determination of what judicial independence means, there have been some international human rights law-based views that are directed to the internal scope of application of judicial independence in states (12-13). In this context, the United Nations Human Rights Committee published General Comment that dealt with the issue of judicial independence when it stated:

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. (“UN Human Rights Committee, para. 18”).

The European Commission of Human Rights commented on the three-tiered requisite of judicial independence by stating that such requisite refers to “the whole organizational set-up, including...the establishment of individual courts and the determination of their local jurisdiction” (*Zand v. Austria*, 1978).

The United Nations Human Rights Committee affirmed the actual independence of judiciary from political interference of executive and legislative bodies as a condition of judicial independence, when it was stated in article 3 of the United Nations Basic Principles on the Independence of Judiciary that “Judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law” (Almqvist, 15).

While these requirements of judicial independence have been recognized as essential for the administration of justice in the national settings, they have been regarded as inappropriate considerations of assessing the independence of international criminal tribunals in the international context (23). In this regard, international jurisprudence related to international judicial bodies is generally satisfied with a narrower interpretation of judicial independence that mainly includes the independence in the selection of international judges instead of the nature of the institutional setting of international criminal judiciary (23).

Even though such interpretation of judicial independence is reflected clearly in some *ad hoc* international criminal tribunals, such as the International Criminal Tribunal of Yugoslavia, International Criminal Tribunal of Rwanda, and East Timor; there are still other interpretations that extend the concept of judicial independence in the international context to include other considerations (Mackenzie & Sands, 276).

In this regard, the ILA Study Group on the Practice and Procedures of International Courts and Tribunals presented in 2003 its interpretation of judicial independence in the Burgh House Principles of the Independence of the Judiciary, which stated 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. (Burgh House Principles, 1.2)

Therefore, the legal basis under which the degree of political interference with the international criminal tribunals in general and with the ICC in particular is assessed and criticized, is still not clear. However, when considering judicial independence as a critical standard for the evaluation of the efficiency and integrity of a judicial body, it is only reasonable to extend the scope of the term to include all features of the judicial body under which two dimensions of independence are achieved, the personal dimension represented in the independence of judges, and the institutional dimension represented in the independence of judiciary (Ferejohn, 353; O’Conner, 1).

3.3. Practical implications from the relationship between the Security Council and the ICC

Despite the division on the issue of whether or not the role practiced by the Security Council over the jurisdiction of the ICC is considered theoretically acceptable within the international parameters of determining judicial independence of international criminal tribunals, the practical implications of such roles consolidate the argument that the political influence of the Security Council over the Court is unescapable in a way that could actually undermine the integrity of the judicial independence of the Court.

3.3.1. The control of the big powers over the Security Council’s ICC-related powers:

One of the criticisms against the relationship between the Security Council and the International Criminal Court is the role that the permanent super powers of the Security Council play in the referral and deferral decisions. As discussed earlier, any Security Council resolution of referral or deferral is subject to the concurring votes of the five permanent members of the Council (Couture, 15; Kocar, 174). However, three states, namely the United States, Russia and China, are not members of the Rome Statute of the ICC (15; 174). The question asked here is how it is reasonably justified that those states, which are not members of the Court system, have the power to control such aspect of its jurisdiction (Mistry & Verduzco, 3). Another related question is how it is considered acceptable that such non-member major powers have the right to exclude themselves from the jurisdiction of the Court, but subject other non-members to its jurisdiction (3).

It could be argued that such situation reintroduces the much-criticized concept of “Allies’ justice” that was imposed during Nuremberg and Tokyo Tribunals (Kocar, 174), as it presents a considerable defect in the Statute of the ICC, which contradicts the basic principle of equal sovereignty in the context of international relations and implementation of the rules of international law.

Regardless to the dimensions of the concept of judicial independence within the international context, this argument could provide for this biased right given to the permanent members of the Security Council as a clear

indication of political interference in the jurisdiction of the ICC. It would have been better for the integrity of an independent court like the ICC if it was to give itself the jurisdiction over non-members to implement a more suitable approach that protects its integrity and credibility.

Saying that, it is relevant to point out that discussing the role of major powers that are not members to the Court over its jurisdiction diverts the issue to another one that is not less controversial, the status of the permanent members in the Security Council. Such status, represented mainly by the veto power, has been subject of debate for a considerable period, and a source of undermining the credibility of the United Nations in the first place. However, the position of the permanent members in the Security Council is agreed by many to be a matter of reality that is imposed on the rest for considerations that are outside the scope of this article's discussion. This reality finds itself affecting by default the function of the Court when considering the mechanism of adopting Security Council's resolutions for referral or deferrals. The current situation might be supported, though, by a similar line of argument usually used to uphold the current privileges of the major powers in the Security Council, which is based on the idea that these states hold the maximum responsibility in the maintenance of international peace and security due to their global position and multi-sided influence. Therefore, it is reasonable that such countries enjoy special status in the Security Council to enable them to effectively fulfil their responsibility. Consequently, the close connection between the subject matter of the Court jurisdiction and international peace and security, the main responsibility of the Council, gives way for major powers in the Security Council to live up to their responsibility and act in their capacity as the main guardians to international peace and security rather than being members or non-members in the Rome Statute of the International Criminal Court.

However, this argument focuses on the optimal but unrealistic role that the Security Council is supposed to do, where members deal with situations that threaten international peace and security which include in many cases the crimes subject to the jurisdiction of the ICC objectively; and ignores the reality of the situation, where political interests and alliances of the major powers of the Security Council have shaped so far, to a large extent, the way the Council acts with such situations. This might potentially lead to an outcome where such powers in the Security Council infiltrate their political interests into the supposedly pure judicial nature of the Court system through their role in the referral and deferral procedures of the Security Council, which is going to be discussed in the next section.

3.3.2. *The selectivity of the Security Council with its referrals*

The Security Council is also widely viewed as being selective in practicing its role of referral (174; Couture, 15; Mistry & Verduzco, 4). It has so far referred the two situations of Darfur and Libya. The question, however, is what distinguishes these two situations from those of Syria, Gaza, or elsewhere that were not considered by the Council for the ICC jurisdiction (Kocar, 174; Mistry & Verduzco, 4). It is true that the report of the United Nations Office of the High Commissioner on Human Rights had played an influential role over the Council's Libya referral resolution (Kocar, 175). It is also true that the situation of Darfur has resulted in thousands of casualties and over 1.65 million of displaced people, which warrants the action of the Security Council in this regard (175). However, it is a fact that the Syrian situation, for example, which has left so far hundreds of thousands of people killed, millions displaced and a number of reported cases of war crimes and crimes against humanity (175); serves as one of the most eligible situations for the referral of the Security Council to the ICC. Despite such widely recognized eligibility, the Syrian situation has not been subjected to the jurisdiction of the International Criminal Court through a Security Council's referral.

The Syrian example, among others presents the Council as being selective in deciding what to be subjected to the jurisdiction of the Court. The lack of consistency by the Council is viewed by many as dragging the Court to an undesired link with the presumed political considerations associated with such selectivity. Infiltrating the politics of the Security Council's selectivity into the Court's system is considered by many as undermining its credibility and integrity.

In this context, it is agreed that the nature of international judiciary is different to that of domestic one in the sense that there are considerations and interactions in the international context contributing to such difference, which makes it inappropriate to strictly compare domestic judiciary with international one. However, for the purpose of illustrating the danger of selectivity on the integrity of the ICC, it is relevant to apply such scenario on domestic judiciary in a given country, and imagine the body responsible for referral of cases to a court, usually the office of public prosecution, acts without having objective criteria for its referrals other than unjudicial factors, such as wealth, status, and influence, which results in many crimes go unpunished. Such situation would have a disastrous impact on the judicial system in that country, where it would lose its credibility as a capable and just system.

Returning to the international context, specifically to the security Council's role in the Syrian situation. Some could argue that the Council tried to exercise its role of referring the situation to the ICC jurisdiction, but was blocked by the constant vetoes of Russia and China. In other words, the failure of the Council to refer the widely recognized eligible Syrian situation to the Court's jurisdiction has been a forced selectivity, rather than a

willing one, imposed on it by the veto of two permanent members despite its attempts to live up to its role.

This argument, however, ignores the outcome of the Council action, and focuses on its efforts. The failure of the Security Council to refer some eligible situations to the jurisdiction of the ICC presents a case of selectivity in conducting its role regardless of whether it is a Council-majority-desired selectivity or undesired one imposed as a matter of reality by the veto vote. In both cases of selectivity by the Council, the political interest is the reference point for the Council's position. The difference is that in the first case, the Council's members, especially the permanent, share the same political interests of disinterest, whereas in the second case there is a clash of political interests that ends in a veto.

In the middle of these political battles and compromises, the Court sits at the other end waiting for what this highly politically charged process is going to present in the form of a referred situation that acquired the blessings of political interests of the Security Council's permanent members. As a result, the ICC could be seen to have been pulled, willingly or unwillingly, to what many view as the political mess of the Security Council, which could pose a threat to its integrity, credibility, and above all international respect and recognition among states, which probably the African Union sets a good example in this regard.

It could be argued that developing criteria, where a clear understanding is established on the relationship between the commission of crimes under international law and the existence of threats to international peace and security, would assist in creating consistency in the way the Security Council deals with certain situations eligible to be subject to its referral to the jurisdiction of the ICC (Mistry & Verduzco, 4). Such argument expects the Security Council to act and practice its role of referral to the ICC in a given situation once it satisfies all elements of the established criteria (4).

This approach might create consistency in how the Council characterizes certain situations with reference to crimes under international criminal law and their threat to international peace and security, but would not necessarily develop consistency and abolish selectivity in the way the Council deals with such situations through their referral power to the Court. The argument ignores the fact that the Security Council is a political body, where various political considerations and interests interact to shape its decisions, and where the concept of "state consent" is still the basis for its decision-making process. This means that in order to achieve the required degree of state consent necessary to adopt a certain outcome, such considerations and interests must reach a status of workable harmonization sufficient to agree on that outcome. In practice, achieving all elements of the suggested criteria would not necessarily unite the political interests of members of the Security Council in dealing with a situation, which would lead to the same selectivity of the Council without such criteria.

3.3.3. *The restricting nature of the Security Council's referrals to the jurisdiction of the ICC*

The political influence of the Security Council over the jurisdiction of the ICC is not limited to who controls its power of referral and deferral, or the basis on which this power is exercised, but also affects the substance of the referral resolution itself. It is argued that "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" (Alamuddin, 113).

The Security Council has exercised limitations in the two instances of Darfur and Libya (SC Res 1593, 2005; SC Res 1970, 2011), where it practiced its role of referral. In this context, the Council restricted the jurisdiction of the Court in resolution 1970 to crimes committed in Libya since 15 February 2011 in what is alleged to be a politically motivated safeguard for the protection of western leaders' complicity with Gaddafi's regime, and to shield them from liability (Alamuddin, 114). The Security Council also included the nationality limitations in both its resolutions of 1593 and 1970, where it excluded from the jurisdiction of the ICC the acts committed in Darfur and Libya by nationals of states not parties to the Rome Statute other than Sudan (SC Res 1593, para 6; SC Res 1970, para 6).

Despite the questionable motivation behind such restrictions, the Security Council's limitations based on geography and time could be argued to be part of determining the situation subject of referral to the jurisdiction of the ICC. It is reasonable, under such argument, to define the referred situation in accordance with specific elements of time and place to avoid undesired fluidity in the Court's jurisdiction to the detriment of the purpose of referral in the first place. However, in the perfect world of true international judicial independence, it would be optimal for the integrity and credibility of the international judicial body to assess itself the temporal and spatial considerations that are relevant to adjudicate a certain situation.

On the other hand, by allowing itself to determine who will and who will not be subject to the jurisdiction of the Court through the nationality restriction in the resolutions of 1953 and 1970, the Security Council is argued to have legally violated the Rome Statute, which requires the Council to refer to the jurisdiction of the Court a situation without making reference to a specific crime or individuals as a matter of respecting the inalienable right of the Court to conduct its own legal assessment and characterization of the situation (Schabas, 174).

Such limitations, along with temporal and spatial limitations, are argued to be almost amounting to referring a specific case. But, in practice, there is no use of debating the legality of the Security Council resolutions. The

fact that the International Court of Justice does not have the capacity under the United Nations Charter to review the Security Council's resolutions, leaves the mechanism of contesting the legality of such resolutions unclear and unutilized (Zifcak, 38).

Some could argue that the Rome Statute of the ICC gives the Court's persecutor the power to decide not to proceed with a referral from the Security Council, which would maintain the judicial independence of the Court in cases of questionable referrals (Bosco, 24). Despite the rationality of such argument, the fact that resolutions 1593 and 1970 went unchallenged by the prosecutor's office represents what could be viewed as a dangerous precedent that is detrimental to the integrity and credibility of the Court, considering the highly criticized defects of the resolutions, not only based on the legality of their wordings in accordance with the Rome Statute of the Court, but also what many consider as the questionable motives that initiated such referrals in the first place (24).

3.3.4. *The controversy surrounding the Security Council's power of deferral*

The second element in the relationship between the Security Council and the ICC is embodied in the power of the Council to defer the Court's proceedings through a resolution adopted under Chapter VII of the United Nations Charter. The deferral procedure is not less controversial than its precedent, the power of referrals. In fact, it might even be viewed to have more damaging impact than referrals on the independence of the Court, and ultimately on its credibility and integrity.

Despite the fact that it has not been utilized yet, the prosecutor's power not to initiate proceedings based on such Security Council referrals constitutes a safeguard for the independence of the Court. Therefore, the ability of the Council to interfere in the Court system through its referrals is, at least theoretically, subject to the Court's approval. However, in terms of judicial independence, the ability of the Security Council to suspend an ongoing investigation or prosecution, without allowing the Court to have its say in the matter, could be viewed to constitute an explicit interference in its mandate and independence.

Even though, the power of deferral has only been used once by the Security Council in Resolution 1422 in 2002 (SC Res 1422 Para. 1), which gave immunity from the jurisdiction of the ICC to "current or former officials or personnel from a contributing state not a party to the Rome Statute regarding UN-authorized operations" that was renewed by Resolution 1487 in 2003; its use has triggered problematic indications.

It was argued that such deferral under Article 16 of the Rome Statute was utilized without any real reference to the existence of a threat to international peace and security, which makes the legitimacy of such resolution questionable in the absence of a legitimate threat to justify it (Mcgoldrick, 438). This argument was even supported by Kofi Anan, the former Secretary General of the United Nations, when he stated at the time of the resolution that article 16 has been used to provide protection for certain countries' nationals, not to advance peace and security (Couture, 18).

The biased use of deferrals in a way that guards the interests of major powers of the Security Council, regardless to achieving or not the purpose or the legal requirement of such procedure, greatly contributes to lack of credibility and integrity of the Court in the eyes of the less powerful countries. The chances for the lack of trust in the credibility of the system would reasonably mount if bids for deferrals by the less powerful countries in similar situations go unanswered. This is clearly represented in the case of the African Union's efforts with the Security Council to use its power of deferral under article 16 of the Statute in the investigation/ arrest warrant against Omer Al Bashir, which have been vain (18). This has eventually led to a situation of explicit and implicit disregard to the arrest warrant issued by the prosecutor of the ICC against Al Bashir by the African Union Countries, and a noticeable freedom of movement by the Sudanese president throughout the African continent without the slightest concern of extradition.

The spread of this attitude towards the jurisdiction of the ICC could have disastrous impact, not only on its credibility, but also on its existence in the first place. In this regard, the international settings present the willingness of states' cooperation as an undeclared requirement for the success of any international body in achieving its purpose. Therefore, states' lack of cooperation in a particular matter would surely affect the ability of the international body to perform its duties effectively, and the fate of the League of Nations still stands as a witness in this regard, which was considerably due to the lack of commitment by the state members to its declared objectives.

Returning to the ICC, repeated manipulation of powers and procedures to the benefit of a certain group of countries, without an adherence to the legitimacy requirement, could create a status of dissatisfaction towards the credibility and integrity of its mandate to a degree that might affect members' cooperation towards their shared responsibility of fulfilling the Court's duties and objectives. A widespread lack of cooperation could in return threaten the existence of the Court as a result of breaching one of the main pillars of any judicial body, independence.

4. Conclusion

The ICC, as a permanent international court, has evolved to become an improvement to *ad hoc* tribunals in fighting the most serious international crimes. The independence and impartiality of the Court is largely

satisfactory to the international community despite the debatable relationship it has with the Security Council, which was created by the Rome Statute of the Court. Such relationship is viewed by many as a way to infiltrate the influence of international politics into the jurisdiction of the ICC in a form that might undermine its independence, effectiveness and legitimacy.

While they have the potential for achieving the greater good for the international community through enhancing the Court's jurisdiction and serving the ultimate objective of maintaining international peace and security, the referral and deferral powers of the Security Council are viewed to have been manipulated in practice to support the political interests and agendas of few countries that control the Security Council. Such manipulation has been conducted without adhering to the intended legal essence of the procedures, which has led to legitimacy crisis for the Court, especially with developing countries.

The current situation could be considered by some to be a natural outcome to the dynamics of the international settings, which require a degree of compromise by allowing politics into the creation, implementation and enforcement of the rules of international law, and even a desired outcome that consolidates the efficiency of the Court's jurisdiction through an expanded scope accompanied by the needed cooperation of the Security Council ((Almqvist, 25). Despite the potential political implications of the Council's referrals, the procedure allows the Court to extend its jurisdiction to non-parties, which widens the scope of liability for committed atrocities to include individuals who would have been unaccountable without the referral procedure. Therefore, even if such referrals were, in part, a compromise from both legal and political considerations, it is worth keeping in mind that some atrocities would never be subjected to the jurisdiction of the ICC in the first place without the Security Council's referral mechanism. Hence, the commonly used phrase of "something is better than nothing" could be applied in this context. Such argument might claim that the reality of the international settings requires the existence of a link between the ICC and the Security Council to ensure the efficiency of the Court in performing its duties that depend, to an extent, on the cooperation of the Council (26). This reality makes it more reasonable, in light of the international settings, to move away from the strict interpretation of judicial independence, when assessing the relationship between the ICC and the Security Council, towards a more liberalized notion that takes into consideration the interdependencies and overlapping international political and judicial functions in conflict situations that amount to security threats (Karlan, 535).

However, it could be deemed by others to be affecting the integrity and credibility of the ICC, as it violates the concept of judicial independence, which implies the freedom of the judicial institution to function without being subjected to external influence. Even if efficacy considerations might present the overlapping relationship as a not necessarily bad thing, it is still of essence to keep in mind that such relationship could lead to a risk of fostering a general attitude of judicial acquiescence towards a considerable degree of political interference and control over the ICC's jurisdiction (Almqvist, 26). This risk is expressed by Ferejohn when he stated:

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. (Ferejohn, 360)

To accommodate both views, it was suggested that the powers of the Security Council under Rome Statute of the ICC should be reformed in a way that limits the impact of politics on such relationship. Creating criteria under which a decision of referral or deferral is taken by the Security Council is viewed to add legitimacy to the Council's resolution, which in turn safeguards the credibility of the Court. Such criteria could also be accompanied by an explicit or implicit commitment by the Security Council of abstention from veto in cases of committed atrocities. The question is; however, would these reforms occur? Probably not, as it is, in practice, unlikely that the major powers of the Security Council would agree to restrict the way they safeguard their political interests through a strict guideline that govern the referral and referral process that is not subject of the veto power. However, the long-term sustainability of a credible international criminal judiciary depends on similar reforms.

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