

Critically evaluating the special international relationship between the UN Security Council and the International Criminal Court (ICC)

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ABSTRACT

This paper will critically evaluate the relationship between UN security council and the ICC regarding the empowerment of the International Criminal Court and its Prosecutors by the Security Council's use of power under Article 13(b) of the Rome Statute to refer a situation to the ICC and the use of Article 16 to defer investigations and prosecutions. The paper will neatly assess the relationship between the two international bodies. Focusing on the Security Council's intervention in judicial proceedings as a political organ requires some explanation. The purpose for the intervention and the relationship under the primary responsibility of the Security Council for the maintenance of peace and security will be explored to evaluate the effectiveness of the relationship in maintaining peace and security. Analysis will be put on the international relationship in respecting each other's status and mandate to deliver its original aim under international law. Using the Rome Statue to examine the legal parameters of this relationship in addition to any other consideration to define the relationship and the impact of the two institutions.



I. INTRODUCTION

The Rome Statute has not only established a new judicial institution to investigate international crimes, but also established new codes for International Criminal Law. The jurisdiction and judgments of the ICC has great contributions towards the international criminal law, therefore, the relationship between the Security Council and the ICC is viewed as an important one. The ICC was established with the intention to be a credible, independent judicial body, able to adjudicate the most serious of international crimes fairly and impartially, where national judicial systems have failed. Under Article 15 of the Charter the court has automatic jurisdiction over genocide, war crimes and crimes against humanity, and an independent Prosecutor empowered, subject to judicial review, to initiate prosecutions either occurring on the territory of a state party or allegedly committed by a national of a state party.

When considering the importance of the relationship between the two institutions, the main focus will be given to Article 2(1)¹ of the Relationship Agreement between the UN and the ICC, which entered into force in October 2004, this recognized the Court as an independent permanent judicial institution which has an international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. Furthermore, Article 2(2)² declares the principles of the relationship and states that the United Nations and the Court respect each other's status and mandate. The relationship agreement recognized the structural relationship, defining the scope of the 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. Article 13(b) of the Rome Statute, the Security Council may refer a 'situation' to the ICC's Prosecutor. Unlike referrals by the State Parties and Prosecutor acting under his or her *proprio motu* power under Article 13(a) which requires a state's ratification of or accession to the Rome Statute.

¹ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Preamble, Article 2 (1).

² Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Preamble, Article 2 (2)



This is the reason why the Security Council referral is viewed extremely significant because it creates jurisdiction. Meaning, the Security Council referral of a situation is governed by both the Rome Statute and the UN Charter.

To briefly outline the requirements for the Security Council referral under the Rome Statute, it is necessary to review Article 13 which declares the exercise of the jurisdiction. The Security Council may act when ‘one or more’ of International Criminal Courts crimes referred to in Article 5³ appears to have been committed’. The Rome Statute preamble makes it clear that the ICC is to prosecute ‘the most serious crimes of concern to the international community as a whole’. This therefore reflects on the threshold of the crimes the ICC has jurisdiction over. The referral of a situation by the Security Council must be in accordance with Chapter VII of the UN Charter. Article 39 of the UN Charter requires a ‘threat to the peace, breach of peace or act of aggression.’ Most importantly, Article 13 asserts that even when the conditions are met, the Courts independence is preserved in that ‘it may exercise its jurisdiction,’ but it is not mandatory to do so. For this purpose, a referral (the appropriate criteria) by SC is enough for the ICC to proceed the procedures.

Referrals of any kind must be undergoing a preliminary examination by the Prosecutor under the Draft Policy Paper on Preliminary Examinations 2010 states that ‘no automaticity is assumed whether the Prosecutor receives a referral from a State Party or the UN Security Council.’ Additionally, Article 53(1) (a) – (c)⁴ of the Rome Statute requires the referral to be evaluated under the conditions of whether there is a reasonable basis to proceed with an investigation’ by considering the jurisdiction of the Court over the crime, the admissibility under Article 17⁵ and the prosecution must be based on the interests of the victims in serving an interest of justice. The Prosecutor is under no obligation, it independently concludes whether there is a reasonable basis to proceed or not. The Pre Trial Chamber can also review a decision held by the Prosecutor to not proceed with an investigation. This process used in

³ *Rome Statute of the International Criminal Court*, 17 July 1998, Article 5.

⁴ *Rome Statute of the International Criminal Court*, 17 July 1998, Article 53(1) (a) – (c).

⁵ *Rome Statute of the International Criminal Court*, 17 July 1998, Article 1



deciding whether a prosecution should proceed or not is important in the event of a referral by the Security Council, as it ensures the independency of the Court of the Security Council⁶.

The answer for the question of whether the Security Council is under a legal obligation to refer a situation can be found in the Rome Statute. The Rome Statute makes no such obligation on the Security Council to make a referral. The only clear responsibility is for the Prosecutor and the judges to follow the instructions upon a referral by the Security Council. The Rome Statute cannot permit or mandate the Security Council to do a referral nor can the Security Council, unless acting under the UN Chapter VII. The UN Charter only suggests action in the face of grave crimes. The relationship between the two institutions appears to be firmly based on legal parameters. The Rome Statute as mentioned above creates no obligation for the Security Council to refer a situation, whilst the UN Charter appears to be holding a firm responsibility for the Security Council in relation to threat to the international peace and security. Meaning, the Security Council using the powers granted under the UN Charter allows the International Criminal Court to prosecute the citizens of the countries that are non party states under the Court's jurisdiction⁷.

The power of the Security Council

Moving on to the powers granted to the Security Council under the UN Charter used as a tool for the international relationship to empower the Court in delivering the Courts aims and objectives. Though the Charter makes it clear that one of the purposes and principles of the United Nations is to promote and encourage respect for human rights. Article 248 of the Charter grants the Council 'primary responsibility for the maintenance of international peace and security' and has evolved into the UN's most powerful forum. Furthermore, Article 25 of the Charter confirms that Member States of the United Nations agree to accept and carry out the decisions of

⁶ Jennifer Trahan, 'the relationship between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices' (2013) 24:417-473.

⁷ Dapo Akande, Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) *Eur J Int Law* 21(4); 815-852.

⁸ *Charter of the United Nations*, 24 October 1945, Article 24.



the Security Council. As of August 2015, there are currently 193 Member States of the United Nations. Thus its decisions are binding on all member states and to an extent on other states acting under Chapter VII of the Charter. In relation to the Security Council role in international justice, Articles 39, 40 and 41 will be in great importance when practicing its power under Chapter VII. Article 39 deals with matters relating to ‘threat to the peace, breach of the peace, or act of aggression’. The article is silent on the term what constitutes to a threat of peace. The Security Council has the entire discretion in considering what constitutes to a threat of peace. Once the Security Council has determined under Chapter VII Article 39 that a threat to peace exists, Article 41 empowers the Council to “decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”.

The Security Council had no role in creating the International Criminal Court. Although, majority of the states voted towards the relationship, for the Security Council to expand the Courts power to prosecute and catch the criminals when necessary. However, minority of states had concerns about the council having the power to prevent investigations and prosecutions. The main concern was that the Security Council is politicizing the Court. As it blurs the distinction between peace and justice. Furthermore, the primary interest of the permanent members is believed to be reaffirmed, which will inevitably politicise the Court. The belief that the Court doesn’t need the Security Council, it can deliver its role without the Council can be criticised by the fact that without the Security Council’s referrals, the court cannot open cases in countries that are not signatory to the Court. Evidently, most of the violations occurring are in the countries outside the Court’s remit. The Council, therefore, empowers the Court by refereeing cases regarding those countries that are outside the remit of the Court⁹. Going forward, the relationship between the Council

⁹ Jennifer Trahan, ‘the relationship between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices’ (2013) 24:417-473.

and the Court should not be seen negatively as previously argued, the Council empowers the Court given the Court's lack of enforcement mechanism, it is argued that the Council's "cooperation with the Court is absolutely necessary in terms of executing and enforcing arrest warrants, collecting and protecting the evidence and witnesses, and exchanging information"¹⁰ this theory connects the two responsibilities of the international institutions responsible for maintaining international peace and security alongside the international justice.

The Security Council's Role in International Criminal Justice

"The United Nations Security Council has a vital role to play in assisting the International Criminal Court to ensure that war crimes and crimes against humanity around the world do not go unpunished"¹¹ In the words of the General secretary of the United Nations, the Security Council has the primary responsibility to maintain international peace and security under Chapter VII of the UN Charter. Going forward, the authority provided to the Security Council under Chapter VII of the Charter will be discussed in bringing out the importance of the powers granted in contributing in the international criminal justice system in order to empower the ICC in maintaining international peace and respect for human rights. The powers granted under the Chapter are self-explanatory based on the wording. Article 39¹² ensures that the Council shall first decide whether a situation calls for a danger of international peace and security. In cases where a situation has occurred, Security Council may make recommendations, engage in provisional measures under Article 40¹³ or place enforcement measures not involving use of force in order to remedy the situation under Article 41¹⁴.

What constitutes a threat to the peace is believed to fall within the discretion of the Security Council, the Charter doesn't provide a definition, therefore, when

¹⁰ Mark Kersten, *A fatal Attraction? 'The UN Security Council and the Relationship between R2P and the International Criminal Court'* (2018), Cambridge University Press.

¹¹ UN News Centre, 'UN and International Criminal Court have joint in ending impunity, (UN News Centre, 17 October 2012) < <http://www.un.org/apps/news/story.asp?NewsID=43312#.VzYRpJ1waUk> >

¹² *Charter of the United Nations*, 24 October 1945, Chapter VII, Article 39.

¹³ *Charter of the United Nations*, 24 October 1945, Chapter VII, Article 40.

¹⁴ *Charter of the United Nations*, 24 October 1945, Chapter VII, Article 41.



determining a situation, it is claimed that in addition to factual findings, political considerations especially found with the use of the Veto power attributed to the five permanent members can also be found to be weighing towards it. To discover the meaning of threat to the peace, Article 1(1)¹⁵ and Article 2(4)¹⁶ of the Charter reflects that the prevention of inter-state conflict is the primary purpose of the Charter while maintaining international peace and security remains as the main goal of the United Nations. Therefore, for a situation that may constitute a breach of peace, there must be a potential occurrence of armed conflict between states in the short or medium term. Assertions against this has been made, the definition of threat to peace includes non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. Whilst it has been declared that under international law, particularly *ius cogens* alongside purposes and principles of the United Nations, under Article 24 paragraph 2¹⁷; the Security Council is required to act in accordance with the principles and purposes set out in Articles 1 and 2 of the Charter.

Once the Security Council has determined that there exists a threat to the peace, the next step is to take action in restoring international peace and security. The powers granted under Articles 40 and 41 provides the Security Council with power to enforce measures, whether military or non-military involvement. The Security Council plays a vital role towards the International Criminal Law acting under Chapter VII powers of the Charter. The decisions of the Security Council are binding and calls on Member States to comply with its decisions. Often referred to a body above the Law. The binding nature of the resolutions under Chapter VII powers certainly has implications on International Criminal Law. Such implications involve; peace keeping missions, establishing ad hoc tribunals, imposing sanctions, making referrals and deferrals of situations and prosecutions for international crimes listed in the Rome Statute.

¹⁵ *Charter of the United Nations*, 24 October 1945, Article 1 (1).

¹⁶ *Charter of the United Nations*, 24 October 1945, Article 2(4).

¹⁷ *Charter of the United Nations*, 24 October 1945, Article 24 (2).



Under the Rome Statute, Article 13(b) the Council can refer situations to the Court when exercising its Chapter VII powers of the UN Charter to maintain peace and security. The powers under chapter VII are applied to refer situations where international crimes appear to have been committed in a state even if that particular state is not a party to the Rome Statute. The Council and the Court work together to convey investigations to the Court using the Council's powers to prosecute those who have committed international crimes and where there has been no action for domestic investigations. It is believed that instead of creating another ad hoc tribunal, the Council empowers and depends on the Court in prosecuting and investigation international crimes that have occurred.

The Court is a treaty based body that can only exercise within the jurisdiction set out in the Rome Statute. This means that the Court can only begin an investigation into situations states that have agreed to the jurisdiction of the Court. The Council acting under Chapter VII powers can empower the Court in referring a situation where international crimes were committed and the primary responsibility for the council to ensure international peace and security is not breached, therefore refers the situation to the Court for the crimes to not be left unpunished. This is when the Security Council as a political body plays alongside the International Criminal Court in order to restore peace and open the space for the Court to intervene where it otherwise it could not.

Without the cooperation between the two international bodies, international crimes could go unpunished. In other words, without pursuing justice through politics, the Court has no authority to exercise its legal powers to prosecute the criminals that have committed international crimes in states that are not parties to the Rome Statute. Through the Council's peacekeeping missions and the responsibility to maintain international peace and security alongside the Court through the domestic incorporation of provisions of the Rome Statute both roles can play in strengthening national capacities to prosecute international crimes. With the important roles in contributing towards international criminal law, the Council does recognise a unique avenue with the Court to ensure justice as a crucial element in wider international efforts.



Security Council and the Ad Hoc Tribunals

The Security Council established international criminal tribunals as United Nations subsidiary organs to restore and maintain international peace and security. The tribunals are designed to exercise judicial functions; a measure that is necessary to protect international peace and security under Chapter VII of the Charter. The power was found and established by the Appeals Chamber of the International Criminal Tribunal in the *Tadic* Case¹⁸, it was held “The Security Council has restored to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of the maintenance of peace and security, i.e. as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia”.

Following that, the Secretary General reported to the Security Council on the establishment of the Tribunal stating that “the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII, such decision would constitute a measure to maintain or restore international peace. The establishment of the Tribunal would be justifiable in terms of the object and purpose of the decision to maintain or restore international peace”. Resolution 827¹⁹ of the Security Council created the first international criminal tribunal for the former Yugoslavia to deal with the unmanageable crimes committed in the Balkans. Followed by Resolution 955²⁰ creating the International Criminal Tribunal for Rwanda in 1994. The Security Council has further used its powers under Chapter VII of the UN Charter to establish the Special Court for Sierra Leone. The international criminal tribunals classified as international bodies are creatures of international law, therefore, have operated towards the international criminal justice.

¹⁸ The case of *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, available at: <http://www.refworld.org/docid/40277f504.html> [accessed 14 May 2016].

¹⁹ UN Security Council, *Resolution 827 (1993) Adopted by the Security Council on 25 May 1993*, 25 May 1993, S/RES/827 (1993).

²⁰ UN Security Council, *Security Council Resolution S/RES/955 (1994)*, 8 November 1994, S/RES/955 (1994),



The power found under Article 40 and 41 of the UN Charter allows the Security Council to introduce such measures that have proven to fall within the concept of the primary responsibility of the Council to maintain or restore international peace. Article 41 of the UN Charter gives the Security Council the authority to use a variety of measures to enforce its decisions. Straightforwardly, this means that the Council has delegated the powers to the Tribunals under Chapter VIII to perform their designated judicial functions. The delegated mandates of the Tribunals are set in the statutes belonging to the Tribunals created by the Security Council. The powers granted to the Security Council under Chapter VII and Article 25²¹ of the UN Charter, when the Security Council delegates its power to International Tribunals as a subsidiary organ of the UN the decisions of the Tribunal becomes binding on the Member States of the UN. The ad hoc tribunals present a model, if not certainly an engagement within the International Criminal Law.

The ad hoc tribunals are viewed as centerpiece of the International Criminal Court. Nonetheless, the Court was proposed to be established independently to deliver its judicial role in prosecuting those who have committed international crimes defined under the Rome Statute. Going forward, the Court does share an international relationship with the UN Security Council in assisting the Council to restore and maintain international peace and security.

The two international bodies have their own responsibilities both contributing towards international law generally and the international criminal law specifically. It is believed that there is indeed a close relationship between peace, security and justice, therefore, the Court working on accountability and the implementation of the Rome Statute and the Council bearing the primary responsibility to maintain peace and security. Consequently, both institutions see that the other can advance its own objectives in certain situations. More openly, the UN Security Council's attention to the Court has pushed the Court into the international limelight²².

²¹ *Charter of the United Nations*, 24 October 1945, Chapter VII, Article 25.

²² Lawrence, Moss 'the UN Security Council and the International Criminal Court: Towards a more principled Relationship' (2013), Friedrich-Ebert-Stiftung.



Referrals and deferrals by Security Council

The center of the legal relationship between the Security Council and the Court is established in two articles of the Rome Statute. Article 13 can be viewed as a pathway for the Council to evade establishing ad hoc tribunals for each armed conflict, the cost, investigations and prosecutions are combined to deliver the objectives of the two institutions. Article 115²³ of the Rome Statute elaborates on the Court expenses, requires the United Nations alongside the member states to provide expenses when referrals are made by the Council. Article 13(b) has an important implications in relation to State consent. The Council allows the Court to initiate a process leading to prosecution of individuals who have committed a crime on the territory of or States that is no party to the Statute although there may be an absence in this state's consent, nonetheless, the Council has the power to refer the situation for the Court to prosecute and investigate.

The Security Council has so far referred two situations related to non-party states to the ICC statute. The first referral was made in 2005, referring the situation in Sudan (Darfur) to the Court. The second referral was the situation in Libya in 2011. Although both referrals will be considered in depth, nonetheless, the referrals were both criticized and applauded. The referrals were viewed as a powerful tool by the Security Council which holds the responsibility of maintaining international peace and security. It illustrated great confidence of the Security Council in the Court. Although in relation to the referral of Libya, it was made by a consensus with the approval of powerful states outside the Rome Statute, which led to questioning the Court of politicization. The accusation was a result of why does the Security Council choose to refer situations outside the Rome Statute and not those within the Rome Statute.

The Darfur referral was followed by a credible process from the Council. The referral began by issuing a presidential statement expressing deep concern of the humanitarian crisis and the situation between the Darfur rebel groups and the Sudanese Government. In July 2004, the Council adopted the resolution 1547

²³ *Rome Statute of the International Criminal Court*, 17 July 1998, Article 115.

²⁴exercising its power under Chapter VII of the UN Charter. The Council determined that the situation in Sudan is a direct threat to international peace and security. Going forward, resolution 1593 ²⁵referring the situation in Darfur to the ICC. This was a major advance for the Court, as Sudan was not a party to the Rome Statute, the resolution allowed investigation and prosecution of crimes committed in a humanitarian crisis that would otherwise be outside the court's jurisdiction. Although the Council was criticized for its credibility in relation to placing sanctions or adapting punitive measures of any kind against the Sudanese Government. As an outcome of resolution 1593 the Council directed the Sudanese Government and all other parties to the Darfur conflict to contribute and fully cooperate with the prosecutor in the investigation and prosecution. The Council acting under Chapter VII of the UN Charter to refer a situation to the Court means that the Council backs up the Court within all its power to mandate cooperation, therefore all member states are part of the cooperation. To this date, this is the only way to make the Courts jurisdiction universal²⁶.

Resolution 1970²⁷ (2011) the second referral by the Security Council made to the Court. The Council referred the situation in Libya believing by protecting civilian's peace and security will be restored. Resolution 1970 was a historic remark for the Council's embrace of the Court. Similar to Darfur, only by the referral from the Council the Court could achieve justice and accountability in Libya. The only possible means for the Court to reach out to Libya as it was not a party to the Rome Statute. The speed of adapting the resolution made it remarkable for the Council with unanimous vote and a repeated language of the previous referral of Darfur Resolution. The Prosecutor acted quickly on the referral, found there was a reasonable need to open an investigation and further requested a warrant. Article 53 of the Rome Statute

²⁴ UN Security Council, *Security Council Resolution 1547 (2004) on the situation in Sudan*, 11 June 2004, S/RES/1547 (2004)

²⁵ UN Security Council, *Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan*, 31 March 2005, S/RES/1593 (2005).

²⁶ Lawrence, Moss 'the UN Security Council and the International Criminal Court: Towards a more principled Relationship' (2013), Friedrich-Ebert-Stiftung.

²⁷ UN Security Council, *Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya]*, 26 February 2011, S/RES/1970 (2011)

carries a very important tool in relation to any kind of referrals made to the Court including the Security Council's referrals. Article 53(1) places the responsibility on the prosecutor to decide that whether to initiate an investigation and upon investigation to decide that there is not a sufficient basis for a prosecution. In making the decision, the Rome Statute requires the prosecutor to consider the concept of interest of justice and further subject to be reviewed by the Pre-Trial Chamber. Interest of Justice will be reviewed based on the context of the Rome Statute, its object and purposes in addition to the requirements of international law.

Although the Council did not only rely solely on the Court, soon after Resolution 1970, the Council adopted Resolution 1973²⁸ authorizing all member states to take all necessary means i.e military force, with the exception of an occupation force, to protect civilians. This factually illustrated that the Council by referring situations to the Court strengthens the Court. Resolution 1970 required the Libyan authorities to fully cooperate with the Court. Although, the Libyan authorities preferred to try Saif al-Islam Ghaddafi in Libyan domestic proceedings rather than surrender him to the Court. Members of the Security Council didn't necessarily want to press for Said al-Islam to be surrendered to the Court. Nonetheless, the Court relying on the Rome Statute Articles 17-19, declared that the Court an independent judicial process, hence it is important that the Members of the Security Council respect it and support it. The two international institutions objectives are to maintain peace and security in working together tailored by the Rome Statute and the UN Charter.

Article 16²⁹ of the Rome Statue states that the Council acting under Chapter VII powers of the UN Charter can request the Court to the affect to defer investigations or prosecutions and this can be renewed under same conditions. The Council can request the Court to defer investigations or prosecutions if it poses a threat to international peace and security. The Kenyan Government authorized by the African Union requested a deferral of the investigation by the Security Council under Article

²⁸ UN Security Council, *Security Council resolution 1973 (2011) [on the situation in the Libyan Arab Jamahiriya]*, 17 March 2011, S/RES/1973(2011).

²⁹ *Rome Statute of the International Criminal Court*, 17 July 1998, Article 16.



16 of the Rome Statute. The deferral was based on the ground that the credible domestic mechanisms could handle the case. However, Council obtained no action as deferral under Chapter VII must be based on a threat to international peace and security. The rejection was challenged by the Kenyan authorities on the basis of the admissibility of the Court under Article 19 of the Rome Statute. However, the Pre-Trial Chamber rejected that an authorized trials to proceed against the Kenyan political leaders.

The Council was applauded for applying the standards of the Rome Statute and Chapter VII of the Charter in declining to defer the Kenyan prosecution. Although there was a great pressure of political influence, however the Council remained lawful in considering the Treaty based standards.

Though the Council is not always praised for remaining impartial from Political pressure. The current situation in Syria is the new matter within the Council and the Court. The failure to refer the situation in Syria is viewed as a political issue. The factual and procedural preconditions of Syria is identical to Darfur and Libya, nonetheless, with the Permanent Members of the Security Council's interest the referral of the situation to the Court remains politically impossible. The Council has made two draft Resolutions condemning the gross violations in Syria. However, unable to make it possible to refer it to the Court as a result of Russia and China Veto powers³⁰.

The relationship between SC and ICC, assessment and implications

The international agreement between the Court and the Security Council known to some as an international relationship where the two institutions have similar objectives in demanding the world to become a better place by promoting peace and security as a result holding those accountable for atrocities who might otherwise be exempt from prosecution and punishment. This view can be highly appreciated by the

³⁰ United Nations, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution' (United Nations, May, 2014) < <http://www.un.org/press/en/2014/sc11407.doc.htm>> Accessed;14/05/2016.



human rights activists and those in favour for expanding the international criminal justice to be applicable in those states that are not party to the Rome Statute. Without a doubt the principle of the expansion of the reach of accountability is something to be welcomed, however, it is also vital to acknowledge the costs of the expansion. Concerns of the impact of a political body to undermine the independence and credibility of the Court. Referrals are believed to be fundamentally inconsistent with the principles of the rule of law, the concept of equality before the law is important. With the three permanent members of the Security Council not ratifying the Rome Statute and the Veto power available to them to use causes problematic concerns in subjecting the non party states to be challenged before the Court. The selectivity of referring situations is also a great consideration when examining the powers of the Council. The failure to prosecute those who have committed grave international crimes in Sri Lanka, further unable to act on the current situation in Syria. This is believed to be contradicting the notions of universality and voluntary compliance at the heart of the Rome Statute.

Further contradicting factors include the concept of acceptance. The voluntary acceptance of its complementary jurisdiction is found to be a significant factor. The acceptance is not just important for the practical purpose of facilitating cooperation between the Court and the state parties. It is vital to have the acceptance to build a state consensus around international criminal justice norms. With the powers of the Security Council to refer situation undermines the concept of voluntary acceptance. However, the initial aim of Article 13(b) of the Rome Statue was to prevent immunity from atrocities committed around the world³¹.

Other practical issues in relation to the relationship between the Council and the Court can appear to be practical. Little financial support from the Council to support the Court with the referrals, the lack of practical support in relation to carrying out the investigation under strict rules to achieve the objectives of the investigation. An example will be the lack of support towards the situation in Sudan, to arrest President

³¹ The Council and Court, The Council and the Court: Improving Security Council Support of the International Criminal Court, 2013, University of California.



al-Bashir, including the party states who have had the opportunity to take action, however failed to do so. This therefore, undermines the practical workings of the Court which illustrates the struggle of the Court to carry out its main role to put those on trial that have committed international crimes³².

Though the above criticisms or weaknesses of the relationship between the two international bodies are considerably important. Nonetheless, the relationship is strongly believed to deliver great contribution towards International Law and International Criminal Law. The fact the states were in favour of having relationship at the beginning of establishing the Court demonstrates acceptance and achievement as an outcome of the relationship. The expansion of the Court using the Council's referral empowers the relationship between the two. The Council takes advantage of the Court's judicial exercise in investigating and prosecuting those who have committed international criminal offence and poses a threat to international peace and security. Instead of creating another ad hoc tribunal, the permanent Court plays an important role in delivering its judicial role, while the Council empowers the Court to expand its exercise and greatly contribute towards the International criminal justice system by sending a clear message of acceptance by a consensus due to the great impact it has on International Law.

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پوخته:

ئەم تووژینه وه به هه‌سه‌نگان دنیکی ره‌خه‌گرانه به بۆ په‌یوه‌ندی نیوان ئەنجومه‌نی ئاسایشی سه‌ربه‌ نه‌توه به‌گه‌رتوووه‌کان و دادگای نیوده‌وله‌تی تاوانه‌کان تابه‌ت به‌به‌یزکردنی دادگای نیوده‌وله‌تی تاوانه‌کان و نوینه‌ره‌کانیان به‌به‌کاره‌ینانی هیزی ئەنجومه‌نی ئاسایشی له‌ژیر سایه‌ی ماده‌ی (13b) ی یاسای بنه‌ره‌تی رۆما له‌لایه‌ن ئەنجومه‌نی ئاسایشی بۆ دادگای بالایی تاوانه‌کان و هه‌روه‌ها به‌کاره‌ینانی ماده‌ی 16 ی لیکۆلینه‌وه و دادگایی کردن. ئەم تووژینه‌وه به‌هه‌سه‌نگان دنیکی وورد ده‌کات بۆ په‌یوه‌ندی نیوان دوو دامه‌زراوه‌ی نیوده‌وله‌تی. هه‌روه‌ها تیشک ده‌خاته سه‌ر ئەو ده‌ست تیوه‌ردانانه‌ی ئەنجومه‌نی ئاسایشی له‌ریکاره‌کانی دادگه‌ری ئۆرگانه‌سیاسیه‌کان که پێویستی به‌هه‌ندیک روونکردنه‌وه‌یه. مه‌به‌ست له‌م ده‌ست تیوه‌ردان و په‌یوه‌ندییه له‌ژیر به‌پر‌سیاریه‌تی سه‌ره‌تایی ئەنجومه‌نی ئاسایشی بریتیه‌یه له‌پاریزگاری کردنی ناشتی و ئاسایش. ئەم تووژینه‌وه شیکردنه‌وه ئەنجام ده‌دات بۆ په‌یوه‌ندی نیوده‌وله‌تی به‌پریزگرتن له‌به‌ها و راسپاردی هه‌ردولا به‌مه‌به‌ستی گه‌یاندنی ئامانجی سه‌ره‌کی له‌ژیر رۆشنایی یاسای نیوده‌وله‌تی و به‌کاره‌ینانی سیسته‌می رۆما بۆ لیکۆلینه‌وه له‌پێوه‌ری یاسایی ئەو په‌یوه‌ندیه هه‌روه‌ها پیناسه‌کردنی په‌یوه‌ندی و کاریگه‌ری ئەم دوو دامه‌زراوه‌یه.

المخلص:

يعد هذا البحث تقييماً نقدياً للعلاقة بين مجلس الأمن التابع لمنظمة الأمم المتحدة والمحكمة الجنائية الدولية فيما يخص تمكين المحكمة الجنائية الدولية ومدعيها العامين من خلال استخدام مجلس الأمن للسلطة بموجب المادة (13 ب) من نظام روما الأساسي لإحالة قضية ما إلى المحكمة الجنائية الدولية وكذلك الاستعانة بالمادة (16) لتأجيل التحقيقات والمحاكمات. و عليه سيقمّ البحث بدقة العلاقة بين الهيئتين الدوليتين المذكورتين. و التركيز على تدخل مجلس الأمن في الإجراءات القضائية يتطلب بعض التفسير. فالغرض من التدخل والعلاقة في إطار المسؤولية الأساسية لمجلس الأمن هو حفظ السلم والأمن الدوليين. يعتبر البحث محاولة علمية جادة لتحليل العلاقة الدولية القائمة على أساس الاحترام المتبادل لأطراف العلاقة لمبادئ القانون الدولي واستخدام نظام روما الأساسي لفحص المعايير القانونية لهذه العلاقة بالإضافة إلى أي اعتبار آخر لتحديد العلاقة وتأثير المؤسسات.