

The Politics of International Justice: the Security Council's Impact on the Independence, Effectiveness and Legitimacy of the International Criminal Court



International Human Rights Internship Working Paper Series



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Part I. Introduction

Last summer at the Coalition for the International Criminal Court, following the escalation of the conflict between Israel and the Hamas in Gaza, I was asked to draft a legal memorandum analyzing potential ICC jurisdiction over crimes committed in Palestine. Beyond the issue's technical legal intricacies, I realized how international politics would be the main determinant of the situation's eventual ICC examination. From the political pressures driving the Palestinian Authority to accede the Rome Statute,¹ to an eventual Security Council referral of the case,² the challenges of accountability for crimes committed in Gaza were political more so than legal.³

There are many ways in which politics can interfere with international justice. For the purpose of this paper, I decided to narrow down the topic to the impact of the United Nations Security Council (UNSC) on the International Criminal Court (ICC).

With globalization, the recent decades have seen the explosion of international institutions and mechanisms, highlighting a tendency towards collective transnational solutions, at the expense of the traditional "Westphalian system of law and governance."⁴ Indeed, States are sacrificing their sovereignty for international public good. In light of those changes, rule of law has acquired an undeniably international character.⁵ While the creation of international institutions represents a great collective step, ensuring the legality, equality, legitimacy, accountability and respect of human rights at the institutional level remains to be done to attain a world order where the rule of law actually prevails.⁶

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

² *Ibid* art 13b.

³ See e.g. Julian Borger, "Hague court under western pressure not to open Gaza war crimes inquiry" (18 August 2014), online: The Guardian <http://www.theguardian.com/law/2014/aug/18/hague-court-western-pressure-gaza-inquiry>.

⁴ Spencer Zifcak, "Globalizing the Rule of Law: Rethinking Values and Reforming Institutions" in Spencer Zifcak, *Globalisation and the Rule of Law* (London: Routledge, 2004) 32 at 34 [Zifcak].

⁵ Hisashi Owada, "The Rule of Law in a Globalising World," in Francis Neate, *The Rule of Law: Perspectives from Around the Globe* (London: LexisNexis Butterworths, 2009) 155 at para 17.1 [Owada].

⁶ Zifcak, *supra* note 4 at 36-37 (Zifcak outlines those five components as critical to the rule of law on the international level).

In the international system, separation of powers between the judiciary and the executive is unclear at best. Indeed, under the UN Charter⁷ and the Rome Statute,⁸ the UNSC has been given the power to interfere with the conduct of international justice in the name of peace and security. Nonetheless, unprecedented progress towards achieving a true independent court has been achieved with the ICC. While ad hoc tribunals were pure Security Council creations,⁹ States only have limited ways to interfere with ICC prosecutions. As such, the ICC represents an undeniable success of collective action over self-interest. Despite this, the Court is still dependant on States' political will through the Security Council. Progress is required to achieve true independence.

For Zifcak, effective mechanisms for international dispute resolution, that is, appropriate and effective international courts and tribunals are crucial in underpinning the rule of law internationally.¹⁰ A study of the ICC's effectiveness, independence and legitimacy therefore appears particularly relevant in this respect.

I will therefore argue that, through its referral and deferral powers under the Rome Statute and its obligations under the Cooperation Agreement with the Court,¹¹ the UNSC has contributed to the politicization of the ICC. Indeed, through article 13(b) and 16 of the Rome Statute,¹² the Security Council has interfered on the Court's investigations and prosecutions' orientation, its members' political interests. In addition, through its failure to cooperate and follow-up on referrals, the Council has undermined the investigations' effectiveness. Those effects in turn contributed to the Court's legitimacy crisis.

I will then advocate for a series of reforms necessary to enhance the Court's independence, legitimacy and effectiveness, and ensure its sustainability throughout the 21st century. Short-term practical reforms regulating the Council's behavior and enhancing cooperation

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

⁸ Rome Statute, *supra* note 1.

⁹ See *Charter*, *supra* note 7 at art 29.

¹⁰ Zifcak, *supra* note 4 at 39.

¹¹ Rome Statute, *supra* note 1, art 13b, 16; *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, 10 April 2004 (entered into force 4 October 2004) [*Relationship Agreement*].

¹² Rome Statute, *supra* note 1 at art 13b, 16.

will first be necessary. However, wide ranging long term structural reforms will be the ultimate aim.

Section I will provide a contextual and historical overview of the role of the United Nations and powerful States on the development of international justice. Section II will lay out the legal basis of the Security Council's powers and address how they have led to the politicization of the Court. Finally, section III will present reform possibilities.

Part II. Context

A. The UNSC and international justice: power, politics and legitimacy

The UNSC is one of the UN's six organs established under Chapter III of the Charter of the United Nations (UN Charter).¹³ Indeed, the Charter lays down the UN's organizational structure, necessary for the performance of its objectives. According to Zifcak, the Security Council and the Economic and Social Council could "broadly correspond to an executive," while the General Assembly (GA) would be the equivalent of the legislature and the International Court of Justice (ICJ), the judiciary.¹⁴ As will be discussed further, "the relations between these institutions [...] were by no means such as to create a genuine separation of powers."¹⁵

The Charter also establishes the composition, powers, voting and procedures of all UN organs, including the Security Council.¹⁶ The Council is comprised of fifteen members: five permanent members with veto powers and ten non-permanent members elected by the GA for two year terms.¹⁷ As the organ was established following World War II, the war's winners - the United States, the United Kingdom, France, China and Russia - were appointed permanent members.¹⁸ Given their veto power, those States have since then been able to dictate the orientation of international peace and security initiatives. Under article 24(1), the UNSC has the

¹³ *Charter, supra* note 7, chapter III.

¹⁴ Zifcak, *supra* note 4 at 40.

¹⁵ *Ibid.*

¹⁶ *Charter, supra* note 7, chapter IV.

¹⁷ *Ibid* art 23.

¹⁸ The five permanent members may be later designated as the P5.

primary responsibility for maintaining international peace and security.¹⁹ Under article 29, the Council can also establish subsidiary organs necessary for its functioning. This power has allowed the establishment of international tribunals, such as the International Criminal Tribunal for former Yugoslavia or the Special Court for Sierra Leone, and by that, has given the Council a crucial role in the administration of international justice.

The international community's involvement in the conduct of international justice, however, began before World War II and the creation of UN institutions. Indeed, the development of the law of armed conflict began in the nineteenth century, and with that came the idea that the international community had a role to play in the prosecution of mass atrocities. The Hague Conventions of 1899 and 1907 constituted the first codification in an international treaty of the customs of war.²⁰ After World War I, international public opinion placed an increased pressure on the international community to prosecute those responsible for the war. The Allies at the Paris Peace Conference therefore discussed this possibility.²¹ As a result, the Versailles Treaty and the Treaty of Sèvres with Turkey included a right for the Allies to set up military tribunals.²² Early on, international criminal justice was set up in the interests of war's winners. David Bosco, assistant professor of international politics at American University, even talked of "big powers' ownership of international justice."²³

This tendency was further confirmed following World War II with the Allies delineating the international community's future. This post-war context led to the first substantial international prosecution of war criminals. Prior to the UN's formal establishment, the Commission for the Investigation of War Crimes was established in 1943 to prepare for the prosecution of crimes committed by Nazi Germany. Similarly, the International Military Tribunal for the Far East was established to prosecute Asian criminals. Although Allies spearheaded the efforts, the Nuremberg initiative also gained support of nineteen States, implying some international legitimacy.²⁴ Then

¹⁹ *Charter*, *supra* note 7, art 24(1).

²⁰ William A Schabas, *An introduction to the International Criminal Court*, 4th ed (Cambridge; New York: Cambridge University Press, 2011) at 2 [Schabas].

²¹ *Ibid* at 3.

²² *Ibid* at 4.

²³ David L Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford; New York: Oxford University Press, 2014) at 23 [Bosco].

²⁴ Schabas, *supra* note 21 at 6.

again, trials occurred in the context of victorious leaders trying leaders of countries they had occupied.²⁵ Occupying powers controlled the entire judicial process, to the extent that, in Nuremberg, judges were American, British, French and Soviet.²⁶ The International Military Tribunals nonetheless represented a turning point in the advancement of international criminal justice.

Following World War II, the winners further set up the foundations of an international system structured around their control, to the extent that the system we currently involve in today is still designed for the benefit of the then-world powers. The Security Council and the P-5 described in the previous section exemplify this. Significant efforts towards establishing an international justice system were born out of the post-war context. The ICJ for instance was established in 1946.²⁷ It can however only prosecute States for breach of international obligations, when they accept its jurisdiction.²⁸

On the international criminal side, the UN also had a crucial role. In December 1946, the GA passed a resolution declaring genocide an international crime, eventually leading to the Convention for the Prevention and Punishment of the Crime of Genocide in 1951.²⁹ This followed Raphael Lemkin's work. Lemkin, a Polish Jewish Lawyer immigrant in the US first developed the term "genocide" in 1944 in his book *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress*.³⁰ In 1948, the GA requested the International Law Commission (ILC)³¹ to prepare the statute for a future international criminal court.³² The progress was nonetheless stalled by Cold War tensions, limiting diplomatic progress through, inter alia, repeated vetoes at the UNSC.³³

²⁵ Bosco, *supra* note 24 at 28.

²⁶ *Ibid* at 25.

²⁷ "The Court", online: International Court of Justice <http://www.icj-cij.org/court/index.php?p1=1>.

²⁸ Statute of the International Court of Justice, 18 April 1946, art 36.

²⁹ Schabas, *supra* note 21 at 8; *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 278.

³⁰ Raphael Lemkin, *Axis Rule in Occupied Europe* (Clark, NJ: The Lawbook Exchange, 2008).

³¹ International Law Commission (2014), online: United Nations, Office of Legal Affairs <http://www.un.org/law/ilc/> (the International Law Commission is an international body established by the General Assembly in charge of the progressive development of international law and its codification).

³² Schabas, *supra* note 21 at 8.

³³ Bosco, *supra* note 24 at 34.

The post Cold War context marked a turning point in international criminal justice history. Improved diplomatic relations among big powers allowed for the renewal of the post World War II efforts at establishing a permanent international criminal court. Indeed, a final draft statute for such a court was submitted by the ILC in 1994.³⁴ Mass atrocities being committed with the implosion of Yugoslavia added to that favourable context. The UN therefore faced increased pressure from international public opinion for an institutional response. The UNSC's role under article 29³⁵ in the creation of ad-hoc tribunals was therefore put into practice then. Responding to the Yugoslav crisis, the UNSC decided to establish a tribunal to prosecute persons responsible for violations of international humanitarian law in former Yugoslavia since 1991: the International Criminal Tribunal for former Yugoslavia.³⁶ The International Criminal Tribunal for Rwanda in 1994, the Extraordinary Chambers in the Courts of Cambodia in 1997, the Special Court for Sierra Leone in 2002 and the Special Tribunal for Lebanon in 2007 followed. The UNSC had instrumental leverage in the design of the international justice process. It even led the drafting the tribunals' statutes. "Tribunals for Rwanda and former Yugoslavia echoed Nuremberg in another way: these were instruments fashioned by certain of the most powerful States – through the mechanism of the UN Security Council, rather than by the international community as a whole."³⁷ Indeed, before the establishment of the ICC, Security Council resolutions were the only way to establish international courts. With all its political drawbacks, which will be the subject of this paper, the ICC nonetheless represents significant progress in independence.

B. The creation of the International Criminal Court: process and controversies

The 1990's international criminal justice enthusiasm rapidly brought back the creating of a permanent international criminal court on the table. In 1994, the GA decided to pursue work in this direction, based on the ILC's draft statute.³⁸ Neutral countries sharing this objective of establishing such a Court – the Like-Minded Group – started working on draft modifications as of

³⁴ "Draft Statute for an International Criminal Court" in *Yearbook of the International Law Commission 1994*, vol 2, part 2 (New York: UN, 1994).

³⁵ *Charter*, *supra* note 7, art 29.

³⁶ Schabas, *supra* note 21 at 12.

³⁷ Bosco, *supra* note 24 at 36.

³⁸ Schabas, *supra* note 21 at 16.

1995.³⁹ They believed “powerful states with complex interests had limited ability to advance impartial international justice.”⁴⁰ Indeed, until then, the UNSC had had the responsibility of this task. Debates among States as to the Court’s design and mechanisms rapidly emerged. The P5 were especially wary of potential limitations to their power. A permanent Court, they argued, could threaten their ability to manage peace and security.⁴¹ At the same time, a full-fledged opposition on their part would have been contradictory with their previous efforts at advancing justice through ad-hoc tribunals. Hence, rather than fully opposing the idea, they merely criticized the process.⁴² As such, outlining the UNSC’s role was a contentious issue surrounding the draft statute’s preparation. Despite tensions, the GA established a preparatory committee (PrepCom) to prepare a formal diplomatic conference. In 1997, the compromise idea of limited powers for the UNSC emerged. The US’s Clinton administration still pushed for a Court fully supported by the Council.⁴³

The process of and leading to the Rome Conference proved the UN’s relevance. It had an evolved role in international governance, despite big powers’ opposition.⁴⁴ Indeed, the PrepCom’s process and the conference were UN-led processes from start to finish.⁴⁵ The Rome Conference finally happened in June 1998. A vast and heterogeneous group of 160 States participated.⁴⁶ Support for international criminal accountability had undeniably increased since the international military tribunals of 1945. Unsurprisingly, the UNSC question remained controversial at the conference. The UK joined the “like-minded group,” but the other P5 remained sceptical of reduced Security Council powers.⁴⁷ The “like-minded” wanted, among others, to eliminate the possibility of SC veto on prosecutions.⁴⁸ The P5 were clearly unable to adopt a strong and unified position, which perhaps led to their failure at advancing their interests. The compromise reached nonetheless included limited powers for the Security Council, with the possibility of referrals and deferrals. The process finally led to the adoption of the Rome Statute on July 17th 1998 with 120

³⁹ Bosco, *supra* note 24 at 39.

⁴⁰ *Ibid.*

⁴¹ *Ibid* at 40.

⁴² *Ibid.*

⁴³ *Ibid* at 42-43.

⁴⁴ John Washburn, “The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century” (1999) 11 Pace Int’l L Rev 361 at 365.

⁴⁵ *Ibid* at 363.

⁴⁶ Schabas, *supra* note 21 at 18.

⁴⁷ Bosco, *supra* note 24 at 45.

⁴⁸ Schabas, *supra* note 21 at 19.

States voting in favour, 7 against and 21 abstaining.⁴⁹ Since sixty ratifications or accessions were required, the Statute entered into force on July 1st 2002.⁵⁰ To this date, only France and the UK of the P5 ratified the Rome Statute.

C. Conclusions

This historical overview has revealed that, on the one hand, the international community has played a crucial role in the development of an international criminal justice system since the nineteenth century. From the only possibility of national prosecutions to a functioning international criminal court, collective action on the international level triumphed. At the same time, powerful States have maintained a role in the process. The international system is still led by the victors of the Second World War through their permanent seats at the Security Council. The ICC undeniably embodies great progress towards independence from geopolitical pressures. Despite this, the Rome Statute still allows for political interference in how jurisdiction is triggered and through the remaining Security Council powers.

Part III. The UNSC and the ICC: Practice and Challenges

Section I highlighted the debate surrounding the UNSC's role in the ICC's prosecutorial direction. Consensus at the Rome Conference led to the attribution of referral and deferral powers. This section will first introduce the institutional and legal mechanisms of the ICC-UNSC relationship. It will then address how they have allowed for a politicization of the Court through the Security Council, consequently undermining the Court's independence, effectiveness and legitimacy. Finally, it will present practical relational challenges.

A. The legal basis for the UNSC-ICC relationship

The International Criminal Court is not a UN organ. Yet, the two institutions' inherent link cannot be overlooked.⁵¹ The *Rome Statute of the International Criminal Court*⁵² (Rome Statute)

⁴⁹ *Ibid* at 21.

⁵⁰ *Ibid* at 23.

and the *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*⁵³ (Relationship Agreement) provide the legal basis for the relationship between the ICC and the UN Security Council. This section will analyze the Security Council's powers as laid by those two instruments.

i. UNSC Powers under the Rome Statute

The Rome Statute grants the Council powers to refer a situation to the Court or to defer an ongoing preliminary examination or investigation. Security Council referrals are one of the four mechanisms triggering the Court's jurisdiction under articles 12 to 14 of the Rome Statute. First, the Court may exercise its jurisdiction if a State party refers a situation.⁵⁴ Second, a non-State party can accept the Court's jurisdiction temporarily by lodging a declaration with the Registrar under article 12.3.⁵⁵ Thirdly, the ICC prosecutor can initiate an investigation *proprio motu*.⁵⁶ Article 13(b) is the last mechanism.⁵⁷

Article 13(b) confers the Security Council the discretionary power to expand the Court's jurisdiction to nationals or to the territory of a State that is not party to the Statute. It can refer to the Court "a situation in which one or more of [article 5]⁵⁸ crimes appears to have been committed.⁵⁹" The Council can do so acting under Chapter VII of the UN Charter, that is, when it finds that a situation constitutes a threat to peace and security.⁶⁰ Referrals nonetheless have to be done within the parameters of the Rome Statute,⁶¹ somehow constraining the Council's

⁵¹ Amal Alamuddin, "The Role of the Security Council in Starting and Stopping Cases at the International Criminal Court: Problems of Principle and Practice" in Andraž Zidar & Olympia Bekou, eds, *Contemporary Challenges for the International Criminal Court* (London: British Institute of International and Comparative Law, 2014) 103 at 103 [Alamuddin].

⁵² Rome Statute, *supra* note 1.

⁵³ Relationship Agreement, *supra* note 12.

⁵⁴ *Rome Statute*, *supra* note 1, art 13a.

⁵⁵ *Ibid* art 12.3.

⁵⁶ *Ibid* art 13c.

⁵⁷ *Ibid* art 13b.

⁵⁸ *Ibid* art 5 (article 5 of the Rome Statute outlines the crimes over which the ICC has jurisdiction: the crime of genocide, crimes against humanity, and war crimes. Discussions surrounding the addition of the crime of aggression are ongoing).

⁵⁹ *Ibid* art 13b.

⁶⁰ *Charter*, *supra* note 7, chapter VII.

⁶¹ Schabas, *supra* note 21 at 169.

discretion. It could not for instance refer a situation that occurred prior to the Rome Statute's entry into force.⁶² Referral power is therefore not absolute.

The Prosecutor's authority to decide if there is a reasonable basis to proceed to an investigation, as per article 53, further limits it.⁶³ The Prosecutor may refuse to initiate the investigation of a situation referred by the Security Council, if doing so would go against the interest of justice.⁶⁴

The Security so far referred two situations to the Court, leading to two investigations. The March 2005 referral of the Darfur situation through resolution 1593 was the first.⁶⁵ In 2011, the Council also referred the situation in Libya through Resolution 1970.⁶⁶ Following this referral, the Court initiated a trial against Saif Al-Islam Gaddafi.⁶⁷

Under article 16 of the Rome Statute, the UNSC can also request the Court to defer an investigation or prosecution for a period of 12 months, acting under Chapter VII of the UN Charter.⁶⁸ That is, the Council can prevent the Court from exercising its jurisdiction over a State party when it believes doing so would undermine peace and security according to article 39 of the Charter.⁶⁹ Although controversial, this provision constitutes an improvement from the original ILC draft statute which allowed the Council to block prosecutions just by placing the situation in question on its agenda.⁷⁰

In practice, no investigations have been deferred. Article 16 was only invoked under two circumstances. In 2002, the US threatened to veto all future UN peacekeeping missions unless the Council invoked article 16 to shield non-State party nationals working for UN missions from prosecutions.⁷¹ The UNSC consequently invoked article 16 in resolution 1422 to delay such

⁶² *Rome Statute*, *supra* note 1, art 11 (the requirements of temporality laid out in article 11 preclude the Court from investigating a situation that occurred before the entry into force of the Statute).

⁶³ *Ibid* art 53.

⁶⁴ *Ibid* art 53(2).

⁶⁵ SC Res 1593, UNSCOR, 5158th meeting, S/RES/1593, (2005); Schabas, *supra* note 21 at 170.

⁶⁶ SC Res 1970, UNSCOR, 6491st meeting, S/RES/1970, (2011).

⁶⁷ "Libya," online: International Criminal Court http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/Pages/situation%20index.aspx.

⁶⁸ *Rome Statute*, *supra* note 1, art 16.

⁶⁹ *Charter*, *supra* note 7, art 39.

⁷⁰ Schabas, *supra* note 21 at 183.

⁷¹ *Ibid* at 184.

eventual prosecutions for a year.⁷² The impact of such use of deferral power will be further discussed in part b.

Article 16 was subsequently not brought into play until 2008 following issuance of an arrest warrant against Al-Bashir, the Sudanese Head of State. The African Union (AU) strongly objected, claiming such an arrest would jeopardize the ongoing peace process. It therefore claimed an article 16 deferral had to be used in such instances of justice undermining peace.⁷³ Yet, the Council did not act upon this recommendation, thereby further antagonizing the AU's opinion of the international justice system.

ii. The Relationship Agreement

The 2004 Negotiated Relationship Agreement also governs the ICC-UN relationship.⁷⁴ Pursuant to article 2 of the Rome Statute,⁷⁵ the Secretary General of the UN Kofi Annan and Philippe Kirsch the President of the Court signed an agreement providing for the structure of the two institutions' relationship.⁷⁶ It "recognizes the mandates and independence of both institutions, defines the scope of their relationship and outlines the conditions under which the UN and the ICC will cooperate. This relationship, as elaborated in the Agreement, deals with both institutional issues and matters pertaining to judicial assistance and cooperation."⁷⁷ It further addresses communication between the Security Council and different organs of the Court.⁷⁸ Finally, it underscores both organs' obligation to cooperate.⁷⁹ Despite those provisions, it will be seen that in practice, cooperation and enforcement of Security Council resolutions have been suboptimal.

⁷² SC Res 1422, UNSCOR, 4572nd meeting, S/RES/1422, (2002); SC Res 1487, UNSCOR, 4772nd meeting, S/RES/1487, (2003) (1422 was renewed with 1487 where article 16 was mentioned again).

⁷³ Schabas, *supra* note 21 at 186.

⁷⁴ Relationship Agreement, *supra* note 12.

⁷⁵ *Rome Statute*, *supra* note 1, art 2 (Article 2 of the Rome Statute provided that the UN and the Court had to be brought in relationship by an agreement approved by the Assembly of States Parties and the President of the Court).

⁷⁶ "Cooperation with the United Nations," online: Coalition for the International Criminal Court <http://www.iccnw.org/?mod=agreementsun>.

⁷⁷ *Ibid*.

⁷⁸ Relationship Agreement, *supra* note 12, art 4.3, 7.

⁷⁹ *Ibid* art 17.

B. The Politicization of the ICC through the Security Council

i. Issues of judicial independence

Maintaining separate powers for the judiciary, the legislative and executive branches is fundamental for the rule of law in domestic contexts. In the international order, the absence a true international authority with authority over sovereign States forces the reconceptualization of the rule of law.⁸⁰ Legitimacy and accountability are two of the fundamental values underlying international rule of law.⁸¹ Accountability means that international power holders should be accountable for its use.⁸² According to Zifcak, “the doctrine of separation of powers is no less important globally than nationally. A fundamental commitment to the creation and maintenance of independent judicial bodies” is essential to the integrity of international law.⁸³ However, UN institutions were created in a way allowing for overlapping roles of the executive and the judiciary.⁸⁴ Aiming towards greater separation of powers is essential for long-term supremacy of the rule of law.

The Security Council’s power over the orientation of investigations at the International Criminal Court poses a threat to independence and impartiality of the Court, and thereby undermines its legitimacy. When triggering the Court’s jurisdiction through article 13(b), the Council dictates its views of what this “international judiciary” should consider.⁸⁵ Certainly, the Prosecutor’s last say over initiating proceedings somehow safeguards independence.⁸⁶ Interference becomes even more problematic in cases of referrals. The Council is allowed to prevent a specific investigation or prosecution agreed upon by State parties. Some would certainly say that article 16 can serve the crucial purpose of delaying justice for the advancement

⁸⁰ Owada, *supra* note 5 at para 17.1.

⁸¹ Zifcak, *supra* note 4 at 36.

⁸² *Ibid.*

⁸³ *Ibid* at 37.

⁸⁴ Alamuddin, *supra* note 52 at 109.

⁸⁵ *Ibid.*

⁸⁶ *Rome Statute*, *supra* note 1, art 53.

of peace.⁸⁷ Yet, it cannot be denied that the Council is granted full interference over the conduct of justice.

This issue of overlapping powers therefore shows an inequality of priorities in the international system. While the UN and the ICC mutually recognized the importance of peace and justice,⁸⁸ in practice, peace and security have been allowed to prevail. Beyond the theoretical argument of judicial independence, practical use of referral and deferral powers by the Council have been detrimental to the effectiveness and legitimacy of the institution.

ii. Big powers' control through referrals

The use of article 13(b) referral power by the Security Council presents issues of case selectivity and limitations to the Court's jurisdiction. Certainly, supporters would argue that referral power has allowed an expansion of the Court's jurisdiction by allowing an increased reach over non-State parties. Referrals are undeniably more efficient than establishing new tribunals on a case by case basis.⁸⁹ Despite those advantages, political interference cannot be ignored.

iii. Case selectivity

Through their presence at the Security Council, a few States have the power to decide which situations will face the Court's scrutiny. Through veto power, the P5 have the possibility to decide that a situation will not be subject to the mechanisms of international justice. Practice so far has shown that the P5 have chosen to refer to the Court situations, which did not trouble them, and have completely ignored others, allowing crimes to be perpetrated with impunity. This led to general pessimism as to the Court's capabilities.

The comparison of Libya's consensual referral to the blatant refusal to refer the Syrian case highlights the Council's clear case selectivity. Despite largely superior casualties and pressure of public opinion to refer Syria to the ICC, on May 22nd 2014, China and Russia vetoed a draft resolution of referral.⁹⁰ A letter signed by 57 States in favour of a referral sent to the

⁸⁷ Alamuddin, *supra* note 52 at 111.

⁸⁸ See e.g. Relationship Agreement, *supra* note 12; Rome Statute, *supra* note 1, preamble.

⁸⁹ Alamuddin, *supra* note 52 at 124.

⁹⁰ See SC Draft Res 348, UNSCOR, S/2014/348, (2014).

Council⁹¹ coupled with support of France and the US was not sufficient to counter Russia and China's opposition. According to Kristen Boon, professor of law at Seton Hall University, the situation shows the need to scrutinize the Council and outlines political issues with the administration of international justice.⁹² Following this failure of the international system, Deputy Secretary General Jan Eliasson declared that "states that are members of both the Security Council and the Human Rights Council have a particular duty to end the bloodshed and to ensure justice for the victims of unspeakable crimes."⁹³ The UNSC cannot only refer situations like Libya that serve its "PR" interests,⁹⁴ and refuse to refer others when it frustrates their political interests despite clear findings of international crimes.⁹⁵ The example of Gaza also clearly embodies a political situation that is not in the P5's interests' to see prosecuted. Indeed, despite a UN report clearly finding commissions of international crimes, the UNSC has yet to consider referring the situation. In brief, Council members should not be able to apply double standards when it comes to international justice.

iv. Limitations of jurisdiction

Even in referred situations, the Security Council influences the investigations' orientation through limitations of jurisdiction. "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 argues.⁹⁶

First, resolutions 1593 and 1970 referring the situations of Darfur and Libya to the ICC both contained restrictions as to time and place.⁹⁷ Resolution 1593 restricted the Court's jurisdiction to Darfur rather than Sudan. The time constraint in resolution 1970 is however more

⁹¹ Thomas Gurber, "Letter to his H.E. Mr Mohammad Masood Khan, President of the Security Council for the month of January 2013" (14 January 2013), online: Confédération Suisse <http://www.news.admin.ch/NSBSubscriber/message/attachments/29293.pdf>.

⁹² Kristen Boon, "Implications of Security Council Veto on ICC Referral of Syrian Situation" (23 May 2014), online: Opinio Juris <http://opiniojuris.org/2014/05/23/implications-security-council-veto-icc-referral-syrian-situation/> [Boon].

⁹³ *Ibid.*

⁹⁴ Interview of Nidal Jurdi, visiting scholar at McGill University's Faculty of Law (29 October 2014) [Jurdi].

⁹⁵ United Nations Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, HRCOR, 12th session, A/HRC/12/48, (2009).

⁹⁶ Alamuddin, *supra* note 52 at 113.

⁹⁷ SC Res 1593, *supra* note 66; SC Res 1970, *supra* note 67.

problematic. Indeed, the Security Council decided to limit the Court's jurisdictions to crimes committed since 15 February 2011,⁹⁸ allegedly out of the concern of western leaders' complicity with Gaddafi.⁹⁹ Limitations therefore become problematic when they are "meant to shield allies from liability."¹⁰⁰

In addition, the Council also included nationality limitations in its resolutions. In fact, resolutions 1593 and 1970 excluded jurisdiction over nationals of non-State parties even if crimes were committed in Sudan or in Libya.¹⁰¹ According to Schabas, such provisions' legality could be questioned, as they seem contrary to the Rome Statute.¹⁰² Article 13b's goal is to limit referral power to a situation rather than a case or individuals.¹⁰³ Yet, those limitations of jurisdiction almost amount to referring a specific case. Despite this potential illegality, the mechanisms for contesting Security Council resolutions' legality remain unclear.¹⁰⁴ In fact, the ICJ does not have the capacity under the UN Charter to review the legality of UNSC resolutions. Judicial review remains a crucial institutional mechanism for international rule of law.¹⁰⁵ Addressing this issue is therefore paramount.

Faced with this clear case of selective jurisdiction, the role of the prosecutor would have been to take the necessary measures to maintain judicial independence. However, in practice, resolutions 1593 and 1970 came unchallenged by the OTP.¹⁰⁶

All in all, while it cannot be denied that referral power enhances greatly the Court's reach over non-State parties,¹⁰⁷ referrals have nonetheless become acts of control by the big powers. As Bosco would say, they have "allowed the major power dominated Security Council to shape the resource-constrained court's docket."¹⁰⁸

⁹⁸ *Ibid* at para 4.

⁹⁹ Alamuddin, *supra* note 52 at 114.

¹⁰⁰ *Ibid*.

¹⁰¹ Schabas, *supra* note 21 at 172; SC Res 1593, *supra* note 66 at para 6; SC Res 1970, *supra* note 67 at para 6.

¹⁰² Schabas, *supra* note 21 at 173.

¹⁰³ *Ibid* at 174, Alamuddin, *supra* note 52 at 117.

¹⁰⁴ Schabas, *supra* note 21 at 174.

¹⁰⁵ Zifcak, *supra* note 4 at 38.

¹⁰⁶ Bosco, *supra* note 24.

¹⁰⁷ David Scheffer, "Blueprint for Legal Reforms at the United Nations and the International Criminal Court" (2004-2005) 36 *Geo. J. Int'l L* 683 at 696 [Scheffer].

¹⁰⁸ Bosco, *supra* note 24 at 180.

v. A biased use of deferrals

The rationale behind article 16 is fair. Delaying the justice process when it may undermine peaceful reconciliation makes sense. Yet, its use by the Security Council to bar prosecutions over nationals of non-States parties working for peacekeeping missions has been so far problematic. Indeed, article 16 was invoked without any real reference to a breach of article 39 of the UN Charter,¹⁰⁹ that is, a real threat to peace and security.¹¹⁰ Instead, Kofi Annan, former UN Secretary General, declared that article 16 had been used to provide cover for nationals of certain States, not to advance peace and security.¹¹¹

In addition, the use of article 16 shows the bias towards big powers' political interests. While article 16 was invoked in a case of no clear threat to peace and security with 1422, efforts by African states to ask for the UNSC to use to article 16 to veto investigation/arrest warrant against Al Bashir have been futile.¹¹² It is not clear whether article 16 should in fact have been invoked in this situation. The problem remains that the UNSC never really looked at the issue in a case, which plausibly could have required action under Chapter VII.¹¹³ As such, article 16's use has greatly contributed to the illegitimacy of the ICC in the eyes of "less powerful" countries, especially members of the African Union. Practice has undeniably revealed a bias towards the promotion of self-interest of big powers to the expense of international justice.

C. An impaired effectiveness through practical relational challenges

Beyond the Security Council's political interference over ICC investigations, the lack of practical cooperation has also undermined the Court's efficiency and effectiveness. Once the UNSC refers a situation to the Court, it does not have the full powers to undergo effective investigation, since obligations of cooperation for arrest and surrender only apply to State

¹⁰⁹ *Charter*, *supra* note 7, art 39.

¹¹⁰ Chris Gallavin, "The Security Council and the ICC: Delineating the Scope of Security Council Referrals and Deferrals" (2005) 5 NZ Armed F L Rev 19 at 32, 34 [Gallavin].

¹¹¹ Kofi Annan quoted in Alamuddin, *supra* note 52 at 122.

¹¹² Phoebe Murungi, "10 Years of the International Criminal Court: The Court, Africa, the United Nations Security Council and Article 16 of the Rome Statute", online: (2012) SSRN <<http://ssrn.com/abstract=2169819>> at 2 [Murungij].

¹¹³ *Ibid* at 3.

parties.¹¹⁴ Cooperation and follow up from the Council is therefore needed. Experience has however shown that the Council is in no way committed to the investigations it made possible.¹¹⁵ In fact, the situation of Darfur was referred to the Court in 2005, and the first warrant against Al-Bashir issued in 2009.¹¹⁶ The Sudanese head of State has yet to be surrendered to the Court.

On October 23rd 2014, the issue of cooperation with the ICC was addressed at the Open Debate on the Working Methods of the Security Council. Fatou Bensouda, the ICC's Chief Prosecutor identified the lack of follow up on referrals and the problem of cooperation as the two main issues of the relationship between the Court and the Council.¹¹⁷ Several States joined her in her call for more efficient, effective and responsive follow-ups.¹¹⁸ When making referrals, the Security Council decided that situation countries' authorities had to cooperate fully with the Court and the Prosecutor.¹¹⁹ Yet, the ICC does not have any enforcement mechanisms. When the Council refers a situation under Chapter VII, expectations are that it will take the appropriate measures to ensure enforcement.¹²⁰ "If there is no follow-up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII of the UN Charter would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile."¹²¹ On the other hand, the Council has the power under article 39¹²² to determine that failure to cooperate with the ICC constitutes a threat to peace and security, and impose sanctions on that basis.¹²³ The case of Al-Bashir shows the need for such measures on the part of the Council to finally ensure surrender. All in all, the lack of cooperation and follow-up has greatly

¹¹⁴ Tiina Intelmann, "The International Criminal Court and the United Nations Security Council: Perceptions and Politics" (28 May 2013), online: The World Post http://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council_b_3334006.html [Intelmann].

¹¹⁵ Bosco, *supra* note 24 at 180.

¹¹⁶ "Darfur, Sudan" (2014), online: International Criminal Court http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx.

¹¹⁷ UNSCOR, 7285th meeting, S/PV.7285 (2014) [S/PV.7285].

¹¹⁸ *Ibid.*

¹¹⁹ Letter dated 8 October 2014 from the Permanent Representative of Argentina to the United Nations addressed to the Secretary-General, SC Concept Paper, UNSCOR, S/2014/725, (2014) [SC Concept Paper].

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Charter*, *supra* note 7, art 39.

¹²³ Murungi, *supra* note 113 at 12.

undermined the efficiency and effectiveness at the ICC, and will continue to do so if reforms are not implemented.

D. Conclusions: politicization and legitimacy

With 122 State parties¹²⁴ and 9 situations under investigation,¹²⁵ the ICC has done great progress since its inception over a decade ago. Despite this, it has been the subject major criticism and has seen its legitimacy eroding. The ICC's legitimacy is dependant on the extent to which States feel bound by its decisions.¹²⁶ Legitimacy will in turn influence the extent to which States' officials are willing to cooperate and comply.¹²⁷ "In order to secure the Court's existence, strengthen its support amongst States Parties and increase its appeal to non States Parties, it is vital to protect its image as an independent institution whose sole purpose is to uphold international criminal justice for all. This is not possible if the legitimacy, impartiality and independence of the ICC is considered questionable."¹²⁸ Interference from major powers through the Security Council has not helped, especially since the organ is under the partial control of non-State parties.¹²⁹

This section has indeed highlighted the effect of the relationship with the Security Council on the Court's independence and effectiveness. The Council's powers under article 13(b) and 16 of the Rome Statute have led to interference over the judiciary's independence and impartiality. Case selectivity, limitations over the Court's jurisdiction and attempts at shielding some individuals from prosecution have further been emphasized. Finally, the lack of cooperation and follow up by the Council "constitute a serious weakness of the system, produce a delay in delivering justice and ultimately a feeling of abandonment, desperation and continued injustice in affected communities."¹³⁰ The UNSC's impact has therefore been one of many impediments to the Court's legitimacy.

¹²⁴ "The States Parties to the Rome Statute" (2014), online: International Criminal Court http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

¹²⁵ "Situations and cases" (2014), online: International Criminal Court http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx.

¹²⁶ Michael J Struett, "The Legitimacy of the International Criminal Court" in *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (New York: Palgrave Macmillan, 2008) 151 at 153.

¹²⁷ *Ibid.*

¹²⁸ Murungi, *supra* note 113 at 16.

¹²⁹ 3 of the 5 permanent members of the UNSC are non-parties to the Rome Statute.

¹³⁰ Intelmann, *supra* note 115.

Two main issues need to be addressed. On the one hand, the self-interested behaviour of Security Council members is problematic. On the other hand, Council's structure does not allow for a good representation of the international system's actual balance of power. To ensure the Court's survival, the international community will need to think about reforms both in terms of technical cooperation, and deeper structural reforms.

Section IV. Reforms

Reforms to the ICC-Security Council relationship will be necessary to ensure the Court's sustainability. As a first step, short-term practical reform will help improve the Court's efficiency. Yet, the legitimacy crisis can only be resolved by profound structural reforms in the Security Council's composition and powers.

Before addressing those concrete changes needed, it is worth noting general attitudes towards reform, which truly embody the debate between realism and idealism in international relations. On the one hand, "pessimist" realists tend to see States has only acting based on their self-interest. Since the ICC's functioning is largely dependant on big powers, and realists would say that big powers will never agree to change,¹³¹ then reform prospects would be bleak. Powerful countries like China, Russia and the US have always been opposed to the ICC, an institution perceived as threatening to their sovereignty. They have in fact not ratified the Rome Statute. As Lauri Mälksoo, an Estonian legal scholar, would say, "it is not cynical but responsible to ask: Why would the Security Council change? If its existence is ruled by the primacy of the political, why not intellectually recognize that double standards and inconsistencies are a constant in the politics of the Security Council?"¹³² Are we just going to say, like Jurdi, that the ICC is a victim of the world order?¹³³

Today's international system undeniably reflects limited victories of collective action. Despite their self-interest, States have agreed to voluntarily join it even in instances in which,

¹³¹ Jurdi, *supra* note 95.

¹³² Lauri Mälksoo, "Great powers then and now: Security Council reform and responses to threats to peace and security" in Peter G Danchin & Horst Fischer, eds, *United Nations Reform and the New Collective Security* (Cambridge: New York: Cambridge University Press, 2010) 94 at 100 [Mälksoo].

¹³³ Jurdi, *supra* note 95.

theoretically, they had no incentive to do so, except the promotion of the public interest and the greater good. While the international balance of power has an impact, and limits the ICC's potential, the existence of the Court itself reflects how collective action can succeed. As such, I will argue that a series of pragmatic, progressive reforms should be sought. Structural reforms are in the long term necessary, if we want to our international system to survive the 21st century. Yet, it seems more reasonable and realistic to aspire at short term reforms with the aim of improving cooperation between the Court and the Council, clarifying the use of Security Council powers, and improving the Court's overall legitimacy, a step necessary as a precondition for long term structural reforms.

A. Short Term

i. Improve ICC-UNSC Cooperation

The need for improved cooperation between the ICC and the UNSC was highlighted during the recent October 23rd Open Debate on the Working Methods of the Security Council. The lack of cooperation and follow-ups on referrals were identified as major impediments to the Court's efficiency.¹³⁴ Reforms in this respect are therefore required.

Various ideas of reforms were brought up at the October 23rd Open Debate. The absence of an actual mechanism for follow-ups was the main issue. Several States insisted on the creation of such processes.¹³⁵ Similarly, the Council also does not have a specific policy with respect to non-compliance. Specific measures need to be established for when States fail to comply with a referral resolution.¹³⁶ Finally, several States questioned the lack of communication between the two organs. Improving the frequency of communication from the current occasional briefings could be a helpful step.¹³⁷

During her intervention, Fatou Bensouda, ICC Chief Prosecutor, also stressed some key reforms to adopt. She emphasized the need for a working group for international tribunals, which

¹³⁴ S/PV.7285, *supra* note 118.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

would be in charge of securing the necessary resources from the Secretariat, States and other actors to address follow-up challenges on a case-by-case basis.¹³⁸ David Scheffer had also made a similar proposal in his 2005 Georgetown Journal of International Law article. Indeed, he recommended that Security Council established a Liaison Group with International Courts to make sure peace and security objectives are well understood by the Courts and to ensure cooperation.¹³⁹ Such a Group could advise the Council as to when and under what circumstances referrals and deferrals should be made to limit accusations of interference.¹⁴⁰

In addition, according to Bensouda, the Council and the Court need to organize situation-specific activities to assess progress as well as identify challenges and areas in need of improvement. This would in turn facilitate enhanced coordination among relevant actors.¹⁴¹ With respect to practical assistance, more effective arrest strategies have to be designed, and there has to be better coordination among the UN, the ICC, the Assembly of States Parties and individual States to track and document the activities and travels of accused persons. More detailed information is necessary to improve follow-up capabilities.¹⁴²

Finally, the ambiguity of language used in referral resolutions have made unclear States' obligation to cooperate.¹⁴³ The OTP therefore believes stronger language has to be used by the Security Council to clarify States' obligations.¹⁴⁴ The Security Council needs to call on non-States parties for assistance, as they have been creating safe havens for individuals against whom arrest warrants have been issued.¹⁴⁵ Council needs to adopt a firmer stance on this matter, and put in place the appropriate sanctions for non-compliance under Chapter VII of the UN Charter.¹⁴⁶ The Netherlands further stressed the need for the Council to emphasize States' *erga omnes* obligations under international law to fight impunity for international crimes.¹⁴⁷

¹³⁸ *Ibid.*

¹³⁹ Scheffer, *supra* note 108 at 693.

¹⁴⁰ *Ibid* at 694, 697.

¹⁴¹ S/PV.7285, *supra* note 118.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Charter*, *supra* note 7, chapter VII.

¹⁴⁷ S/PV.7285, *supra* note 118.

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

Establishing clearer guidelines for the use of referral and deferral powers would also be an important short-term step to minimize political interference.¹⁴⁸ More consensually regulated conduct in this regard could improve Security Council resolutions' legitimacy.¹⁴⁹

Limitations to ICC jurisdiction and selectivity are currently the referrals' main problems. First, the Security Council should stop exempting categories of nationals. Alamuddin argues that they should instead be based on the crime's severity.¹⁵⁰ "In order to reduce the suspicion that the Court is a tool for selective justice, the Council should in future referrals not include language exempting certain nationals from the Court's jurisdiction."¹⁵¹ In addition, referral guidelines should regulate when the Council decides to refer a situation. For instance, findings of an UN-established that international crimes have been committed could automatically trigger a referral discussion at the Council.¹⁵² Finally, referral guidelines should also be designed considering the P5's use of the veto. The example of Syria has shown that the veto has been used to safeguard the P5's political interests. Many scholars, experts and civil society organizations have argued for the adoption of a code of conduct prohibiting the use of veto in cases of mass atrocities.¹⁵³ Indeed, following Russia and China's veto of the referral of Syria to the ICC, several NGOs issued a statement urging the Council to restrain its use.¹⁵⁴

Of course, maintaining realistic expectations as to the P5's agreement to limit their powers is necessary. Yet, France has recently spearheaded an initiative to limit the use of the veto. French diplomats made a statement in this regard at the October 23rd Open Meeting on the Working Methods of the Security Council, and got support from several countries.¹⁵⁵ Such an

¹⁴⁸ Several scholars has stressed this need for regulation of Security Council behaviour. See e.g. Alamuddin, *supra* note 52; Boon, *supra* note 93; Gallavin, *supra* note 111; Murungi, *supra* note 113.

¹⁴⁹ Gallavin, *supra* note 111 at 32.

¹⁵⁰ Alamuddin, *supra* note 52 at 127.

¹⁵¹ *Ibid.*

¹⁵² *Ibid* at 128.

¹⁵³ Boon, *supra* note 93.

¹⁵⁴ "Joint NGO Statement on the Use of the Veto" (2014), online: Global Centre for the Responsibility to Protect <http://www.globalr2p.org/media/files/joint-ngo-statement-on-the-use-of-the-veto.pdf>.

¹⁵⁵ S/PV.7285, *supra* note 118.

initiative from a permanent member leaves some hope as to the P5's will to see their conduct regulated for the sake of international justice.

Guidelines for deferrals should limit abusive use, and prevent diplomats from using them to allow blanket exclusions.¹⁵⁶ Scholars have proposed different alternatives requirements. Luigi Condorelli and Santiago Villalpando recommended that the UNSC should only use deferrals after an express determination of violation had been made under article 39 of the Charter.¹⁵⁷ Murungi only spoke of establishing a "high threshold" for the threat to peace.¹⁵⁸ Antonio Cassese however argued that the correct interpretation of article 16 required that the Security Council only used deferrals when action of the ICC itself constituted threats to peace and security under article 39.¹⁵⁹ The only sure thing is, guidelines have to ensure deferrals are only used where ICC investigations and prosecutions actually constitute threats to peace and security under article 39 of the UN Charter.

While such codes of conduct and guidelines would not be legally binding and remain in the area of "soft law," they could nonetheless constitute a good first step towards better regulation of behaviour.

B. Long term

The use of veto power to prevent referrals and the Council's composition not representative of the world's balance of powers have been the two structural features leading to political biased decisions of the Council with respect to the ICC. Reforms will have to address those problems. The following section will tackle such necessary reforms.

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

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

¹⁵⁶ Alamuddin, *supra* note 52 at 129.

¹⁵⁷ Gallavin, *supra* note 111 at 32.

¹⁵⁸ Murungi, *supra* note 113 at 15.

¹⁵⁹ Cassese quoted in Gallavin, *supra* note 111 at 32.

While it has been seen that referral and deferral powers have been used by the Security Council to influence to direction of prosecutions, if used properly, Security Council's powers can have a positive effect. Referrals can allow for situations that would otherwise fall outside of the Court's jurisdiction to be investigated. Deferrals, if used appropriately, can be really necessary to maintain peace and security. As such, eliminating the Council's role altogether would not make sense, and, realistically would never be agreed upon. Instead, addressing the issues posed by article 13 and article 16 through reforms should be privileged. The 2004 report of the Secretary General's High Level Panel on Threats, Challenges and Change indeed concluded that the Security Council was still the best organ to respond to crises.¹⁶⁰ "Thus, the challenge for any reform is to increase both the effectiveness and the credibility of the Security Council and, most importantly, to enhance its capacity and willingness to act in the face of threats."¹⁶¹

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

The debate surrounding Security Council reform has existed since its creation. In 1950, Hans Kelsen had already predicted that veto power would be the greatest likely source of future challenges of the Council's legitimacy.¹⁶² To date, the only reform occurred in 1965 when the number of non-permanent members rose from 6 to 10.¹⁶³ The question of Security Council was brought back to the GA's agenda after the Cold War.¹⁶⁴ A Working Group in charge of negotiations was created in parallel. As of then, the issue of reforming the Security Council acquired importance at the UN.¹⁶⁵ Despite major debates at the GA, especially in the context of the 2005 World Summit, no consensus has been achieved. SC Reform has recently been

¹⁶⁰ *A more secure world: Our shared responsibility - Report of the High-level Panel on Threats, Challenges and Change*, UNDP/IO, (2004) at para 247 [*A more secure world*].

¹⁶¹ *Ibid* at para 248.

¹⁶² Mälksoo, *supra* note 133 at 94.

¹⁶³ Serge Sur, "Le débat sur la réforme du Conseil de Sécurité" in *Le Conseil de sécurité dans l'après 11 septembre* (Paris: Librairie Générale de Droit et de Jurisprudence, 2004) 135 at 135 [Sur].

¹⁶⁴ In 1992, the GA passed a resolution officially putting the question of Security Council reform on the GA's agenda. See "Governing and Managing Change at the United Nations: Reform of the Security Council from 1945 to September 2013" (September 2013), online: Center for UN Reform Education <http://centerforunreform.org/sites/default/files/SC%20Reform%20Sept%202013%20publication.pdf> at 2.

¹⁶⁵ *Ibid* at 4.

relegated to a new forum: the Intergovernmental Negotiations.¹⁶⁶ An Advisory Group on Security Council was also created in 2013.

Any reform to Security Council composition or powers would require an amendment to the UN Charter. Doing so would require a vote in favour by two thirds of the GA, and all UNSC permanent members.¹⁶⁷ Getting the P5 to agree to reforms will therefore be the greatest challenge.

Council composition and veto power are the main challenges of Security Council reform. To begin with, achieving a better reflection of today's balance of powers is the main objective of Security Council enlargement. Indeed, a more representative Council would lead to more democratic decisions, and therefore less allegations of bias with respect to referrals and deferrals to the Court. The Secretary General's High Level Panel recommended broadening UNSC membership to be more representative of UN membership, especially opening up the Council to developing countries.¹⁶⁸ The Panel even presented enlargement as a necessity.¹⁶⁹ There is a general agreement on the need for permanent seats for Germany and Japan, the idea of enlargement to new permanent members from underrepresented continents, and the idea of adding non-permanent members.¹⁷⁰ Emerging economic powers such as Brazil, India and South Africa have repeatedly expressed their aspiration to join, especially in light of their important financial contribution to the UN. The identity of new permanent members, the number of new non-permanent members, and the correlative changes in voting procedure still need to be agreed upon.¹⁷¹ All in all, decreasing the possibility for States to make self-interested decisions has to be such structural changes' purpose.

While the use of the veto has allowed the P5 to influence which situations were referred to the ICC, it is also hard to conceive full removal of veto power.¹⁷² The P5 probably would not agree

¹⁶⁶ *Ibid* at 23.

¹⁶⁷ *Charter*, *supra* note 7, art 108.

¹⁶⁸ *A more secure world*, *supra* note 161 at para 249.

¹⁶⁹ *Ibid* at paras 250-251.

¹⁷⁰ *Sur*, *supra* note 164 at 136-137.

¹⁷¹ *Ibid* at 137.

¹⁷² *Sur*, *supra* note 164 at 142.

to such a measure, and either way the Panel in fact did not deem it advisable.¹⁷³ Instead, regulating the use of the veto appears more a more viable step. There have been several initiatives to limit the use of the veto in cases of humanitarian crises.¹⁷⁴ The French proposal for a code of conduct previously discussed or the “Responsibility not to veto” project¹⁷⁵ are good examples. Finally, a form of indirect veto could appear if the number of non-permanent members is sufficiently increased to allow the possibility for a majority of States to oppose the P5’s decisions.¹⁷⁶ In short, regulating the use of veto when dealing with international crimes would prevent the Council from limiting the advancement of justice for purely political reasons.

iii. Increasing the General Assembly’s role

Some have argued that an increased role for the GA could help democratize referrals and deferrals. Under article 11 of the UN Charter, the GA can make recommendations to the Security Council, and may call to it attention to situations that endanger peace and security.¹⁷⁷ It however cannot make recommendations with respect to a situation already on the Council’s agenda.¹⁷⁸ Increasing the GA’s role would necessitate amendments to the Rome Statute.¹⁷⁹ It would be based on the principle that came out of the Uniting for Peace resolution¹⁸⁰ that “where the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security, the General Assembly shall seize itself of the matter.¹⁸¹” The AU in fact proposed an amendment to article 16 that would allow the UNGA to act where the UNSC would have failed to do so within a certain period of time.¹⁸² Of course, putting the process in the hands of the GA would not remove the political aspect. Yet, it is undeniable that the GA is more representative of global opinion than the

¹⁷³ Mälksoo, *supra* note 133 at 96.

¹⁷⁴ Sur, *supra* note 164 at 143.

¹⁷⁵ See “The Responsibility Not to Veto: A Way Forward” (2012), online: Citizens for Global Solutions https://globalsolutions.org/files/public/documents/RN2V_White_Paper_CGS.pdf.

¹⁷⁶ Sur, *supra* note 164 at 144.

¹⁷⁷ *Charter*, *supra* note 7, art 11.

¹⁷⁸ *Ibid* art 12.1.

¹⁷⁹ Schabas quoted in Sharam Dana, “Law, Justice & Politics: A Reckoning of the International Criminal Court” (2009-2010) 43 J Marshall L Rev xxiii Foreword.

¹⁸⁰ Christian Tomuschat, “Uniting for Peace General Assembly Resolution 377(V),” online: UN Office of Legal Affairs <http://legal.un.org/avl/ha/ufp/ufp.html>.

¹⁸¹ *Ibid*.

¹⁸² Murungi, *supra* note 113 at 8.

Security Council. Democratization should be the aim of organizational change.¹⁸³ As such, imagining a role for the GA in referrals and deferrals could perhaps partly address the less powerful countries' allegations of bias.

Part V. Conclusion

International politics influence the International Criminal Court's work, and undermine its independence, effectiveness and legitimacy. In this paper, I have shown that the Security Council, through its referral and deferral powers, has interfered with the Court's investigations and prosecutions to suit its members' political interests. Indeed, while referrals should be used to end impunity in non-State parties, and referrals to foster peace and security, they have instead led to case selectivity, limitations of jurisdictions, and political interference. In addition, through its lack of cooperation, the Council has also weakened the Court's effectiveness. This politicization has in turn lead to a legitimacy crisis, especially in the eyes of developing countries.

To turn around this situation, urgent action is needed. Some will say we simply need to accept the international system with its flaws and weaknesses, and acknowledge that power will always rule. Yet, effective, legitimate and accountable international institutions, especially international tribunals are crucial to international rule of law.¹⁸⁴ There is now a general agreement that the international community has a responsibility to prevent mass atrocities worldwide and address international crimes. To do so, we must aim towards an international system based on the rule of law.

As I have argued, the mere existence of the UN and the ICC show the increasing will of States to collectively join to further the public good and advance international human rights. As such, aiming towards realistic and pragmatic reforms to the UNSC-ICC relationship appears not only desirable, but also reasonable.

This paper has therefore proposed a series of reforms. In the short term, the Court and the Council should work towards enhanced cooperation and better follow-ups on referrals.

¹⁸³ Zifcak, *supra* note 4 at 42.

¹⁸⁴ Zifcak, *supra* note 4 at 39.

Possibilities to do so include developing a specific mechanism for follow-ups, establishing non-compliance measures, improving communication, creating a working group for International Tribunals, improving situation-specific assessment of progress, or using clearer language in deferral/referral resolutions. In addition, specific guidelines clarifying the use of referral and deferral powers should also be created.

In the long term, it has been argued that a full removal of the Security Council from the Rome Statute was neither feasible nor desirable. Instead, reforms should address Council composition and veto power. Council composition should be modified to better reflect the world's current balance of power, by giving a voice to emerging countries, as well as the economically powerful. This could in turn lead to more democratic decisions, and enhanced legitimacy. Veto power should also be regulated in cases where the Security Council is dealing with mass atrocities. Finally, imagining a complementary role for the GA in cases of UNSC failure to act can also be considered.

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

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