



LACK OF OBJECTIVITY IN SECURITY COUNCIL'S REFERRALS AND ITS EFFECTS ON INTERNATIONAL CRIMINAL COURT'S PROSECUTION

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Abstract

This paper presents an analysis of the referral and veto power of the United Nations Security Council and its effects on the International Criminal Court's prosecution. It critically examines the role of the Security Council in the maintenance of peace and security under the International Criminal Court. The failure of the Security Council to refer cases to the ICC has prevented the International Criminal Court from prosecuting cases of violation of international crimes under its jurisdiction, promoted human rights violations, impunity for these heinous crimes and led to the accusation by African states of the Court being biased towards Africans. Adopting a purely doctrinal research method, this paper questions why the Security Council members veto proposals for referral of situations to the International Criminal Court irrespective of the massive human right violations taking place in that country as seen in the case of Syria. This has led to accusations by African States of the Court being biased especially as only African states (Libya and Sudan) have been referred to the Court by the Security Council. It concludes that there is lack of objectivity in Security Council's referrals and a misuse of the veto power granted to the P5. There is need for greater objectivity in Security Council's referrals and veto system which will help prevent impunity, human rights violations and accusations of bias by African States.

Keywords: ICC, Security Council, Veto System, Referrals, Peace and Security, Prosecution

1. INTRODUCTION

The Security Council (SC) is one of the six principal organs of the United Nations (UN). It is established by Chapter V of the UN Charter and operates as the executive organ of the UN. It is composed of 15 Members.¹ Ten of these members are elected to two – year terms of the UN’s general membership.² The remaining five seats are reserved for the five permanent members; China, USA, France, United Kingdom and Russia.³ The SC has the “primary responsibility for the maintenance of international peace and security”.⁴ Each SC member has one vote.⁵ Procedural matters require an affirmative vote of nine out of the fifteen members, while substantive matters require a vote of nine of the fifteen members as well as the “concurring votes of the permanent members”.⁶ This means that permanent members have the power to veto substantive resolutions of the Council but not the procedural ones.⁷ On July 1, 2002, the Rome Statute of the International Criminal Court (ICC) entered into force giving the Court jurisdiction over three of the four crimes within its mandate.⁸

The relationship between the ICC and the United Nations Security Council (UNSC) has been constructed by many ICC proponents as a relationship ultimately concerned with the maintenance of international peace and security. On paper, the ICC is not an organ of the UN. In practice, however, various permanent members of the UNSC have sought to control the activities of the ICC from its inception.⁹ In the early stages of negotiations to establish the court, permanent members of the UNSC insisted that the activation of the jurisdiction of the court should be subject to the approval of the UNSC. A compromise was reached during the negotiations for the adoption of the Rome Statute that accommodated both the desires of the UNSC and other delegates. But that compromise came with a price. The UNSC was given powers to refer non-state parties to the Court under article 13(b) of the Rome Statute and defer cases before the court under article 16 while acting under Chapter VII of the UN Charter. These provisions have led to significant controversies in ICC relationships with States and regional actors, and they have been seen by many critics as having the potential to undermine the judicial independence of the ICC.¹⁰ Vetoes by SC members have guaranteed impunity for dictators, prevented ICC’s prosecution and promoted massive human rights violations in the world. The question here is, why will the SC members veto referral of some situations to the ICC despite the massive human rights violations taking place in those countries?

¹ Article 23(1), UN Charter, 1945. Five are permanent members ; China, France, UK, U.S.A, and Russia. The ten non-permanent members are Bolivia, Egypt, Ethiopia, Italy, Japan, Kazakhstan, Senegal, Sweden, Ukraine, and Uruguay. Available on <http://www.un.org/en/sc/members/> last accessed : 02/10/2020

² Article 23(2), UN Charter, 1945

³ Ken, O. 2015. “The Security Council and the International Criminal Court : When can the Security Council Defer a Case ?”. *Strathmore Law Journal*, 120

⁴ Article 24 (1), UN Charter, 1945

⁵ Article 27 (1), UN Charter, 1945

⁶ Article 27(2)(3), UN Charter 1945

⁷ Ken, O. *op.cit.*, footnote 3. 121

⁸ Drew, K. 2011. “Whose crime is it anyway ? The International Criminal Court and the Crime of Aggression”. *Duke Journal of Comparative and International Law*, 110. See also Article 5(2), Rome Statute of the ICC, 1998. The ICC is still to exercise jurisdiction over the crime of aggression

⁹ Kamari, M. C. and Sarah, J. K. 2014. “The Legal Politics of the Article 16 Decision : The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise”. *African Journal of Legal Studies*, 298.

¹⁰ *Ibid.*

The relationship between the SC and the ICC, provided for in the Rome Statute of the ICC, raises questions about political influence over the ICC, personal interest and has compounded the criticism of political bias against Africa.¹¹

2. THE ROLE OF THE SECURITY COUNCIL

The UNSC is the only governing body with legal authority to authorize binding measures necessary to restore peace and security, yet neither the UN Charter nor the UNSC's own rules clarify the extent of its obligations.¹² The UNSC was created after the most destructive war in history to help the world respond to global security threats with overwhelming force if needed.¹³

2.1. THE ROLE OF THE SECURITY COUNCIL UNDER THE UN CHARTER

a. Maintenance of International Peace and Security

The SC is the UN's primary and most powerful organ for carrying out the UN's central mission of peacekeeping in the world. Article 1 of the UN Charter¹⁴ lists as the Organization's first purpose. It is with this primary purpose in mind that the great powers of 1945 were given permanent seats at the Council under article 23 of the Charter as those countries that are best able to perform this central role. Thus, article 24 of the Charter grants the Council 'primary responsibility for the maintenance of international peace and security'.¹⁵

b. Promoting and Encouraging respect for human rights and fundamental freedoms

It is a further purpose of the UN identified in article 1(3) of the Charter. Article 24(2) directs the council to act in accordance with the purposes of the UN in discharging its primary duty of maintaining international peace and security.¹⁶ The Council is decidedly a political body, its members chosen not for their wisdom, virtue or independence, but because they, particularly its five permanent members (P5), have political, economic and military strength to keep the peace, especially when they act together in a cooperative manner envisioned by the Charter.¹⁷

¹¹ Dire, T. 2014. "Complementarity and Cooperation in International Criminal Justice : Assessing Initiatives to Fill the Impunity gap", *Institute for Security Studies*, 1. Also available on <http://diretladi.com/complementarity-and-cooperation-in-international-criminal-justice-assessing-initiatives-to-fill-the-impunity-gap/> last accessed: 07/10/2020

¹² Anna, S. 2013. "The UN Security Council's Duty to Decide". *Harvard National Security Journal*, 4(3):1

¹³ Kara, C. M. and Stewart, M. P. 2010. "UN Security Council Enlargement and the U.S Interests". *Council on Foreign Relations*, 5

¹⁴ To maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace.

¹⁵ Lawrence, M. 2012. "The UN Security Council and the International Criminal Court : Towards a more principled Relationship". *Friedrich Ebert Stiftung*, 2

¹⁶ *Ibid.*

¹⁷ *Ibid.*

2.2. THE ROLE OF THE SECURITY COUNCIL UNDER THE ROME STATUTE OF THE ICC

a. Referral of violations to the ICC

Article 13(b) of the Rome Statute provides that the court may exercise jurisdiction over statutory crimes if “a situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the SC acting under Chapter VII of the Charter of the UN”.¹⁸ The effectiveness of the ICC will largely depend to a large extent on its developing relationship with the SC. The relationship is complicated due to the fact that on the one hand the Court’s decisions may involve issues of a high political sensitivity for the SC and its members while on the other hand, the ICC may need to rely on the Council to ensure that it can operate effectively in practice.¹⁹

Article 13(b) of the Statute gives the SC an express power to refer cases to the Prosecutor in a “situation in which one or more crimes appear to have been committed”. This is one of the ways in which the Prosecutor may be seized of a case under the Statute.²⁰ The SC can, however, enhance considerably the jurisdictional reach of the ICC by using its powers of referral in relation to situations involving non-state parties. Such referrals will in effect allow the ICC to exercise its jurisdiction in relation to non-state parties, a jurisdiction that would not exist but for the SC’s referral.²¹

The second issue that arises in the case of a SC referral is the way in which the referral will be treated by the Prosecutor. A SC referral to the Prosecutor does not necessarily mean the Prosecutor will actually prosecute a case. The reason for this is the independence and impartiality that the ICC organs enjoy vis-à-vis states and other international legal persons including the UN and its SC.²²

The third issue in relation to SC referral is that article 13(b) of the Statute, requires that the council’s Resolution making the referral has to be adopted under Chapter VII of the UN Charter. In order to adopt a chapter VII resolution, the SC must make an article 39 determination that a particular situation constitutes a threat to , or breach of, the peace or act of aggression. This links the peace and security mandate of the SC to the justice mandate of the ICC.²³

The criticism that the action of the court is excessively dependent on the SC and therefore, largely determined by political rather than legal criteria of its jurisdiction is a concern that refers to a statutory aspect. Indeed, the power of the SC over the action of the ICC is stated in the Statute of the court, particularly in articles 13 and 16.²⁴ Two cases have been submitted by the SC. This power granted to the

¹⁸ *Ibid.*

¹⁹ Dominic, M. et al(eds.). 2004. The Permanent International Criminal Court. Oxford : Hart Publishing, 95. That is SC referrals, failure which the ICC cannot exercise jurisdiction over non-state parties.

²⁰ *Ibid.* 96

²¹ *Ibid.* 98

²² *Ibid.*

²³ *Ibid.* 100. The SC shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with article 41 and 42, to maintain or restore international peace and security – Article 39, UN Charter, 1945.

²⁴ Marteus, K. 2011. “The International Criminal Court : Reflections for a stress test on its foundations”. *Journal of International Relations*, 2(1):113

SC has, since the preparatory work behind the ICC statute, met with several objections, ranging from the loss of independence and credibility of the court, to the argument that the SC has no competence in matters of international criminal justice under the terms of the UN Charter.²⁵

The underlying point in any of these criticisms is that cases referred to the ICC are subject to political decision criteria that are different from the eligibility criteria specific to a court like the ICC.²⁶ In addition, there is the fact that of the five permanent members of the SC, three (China, U.S.A and Russia) are not party to the Statute of the court. Given that they have right to veto, any situation occurring in their territories or involving their own nationals would certainly never have the chance of being referred to the court. This reinforces the idea that the jurisdiction exercise of the court may be selective, depending on the dynamics of the SC.²⁷

In cases of crime of aggression, the role of the SC extends even further. The ICC Statute Review Conference held in Kampala in 2010, introduced the crime of aggression, not initially defined in the Statute, and established that the exercise of jurisdiction by the court depends on prior decision by the SC that there has indeed been an act of aggression.²⁸

When referring a situation under article 13(b) of the Rome Statute, the UNSC intends the Court to take action, that is, to investigate and prosecute as appropriate. Therefore, in the case of Libya, the SC referral should be understood as to make binding the provisions of the Statute to a state that is not a party to it; or in other words, to give jurisdiction in a case in which without the referral there would not be jurisdiction given that the acts were committed outside of the territory of the state parties or by non-nationals of a state party.²⁹

The SC passed the referral of the Darfur situation (Resolution 1593) on March 31, 2005 with eleven votes in favour of the referral, none against it, and four abstentions (Algeria, Brazil, China and the U.S.A).³⁰ Article 13(b) of the Statute of Rome states that the ICC may exercise jurisdiction in “a situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the SC acting under Chapter VII of the Charter of the UN”. Having its legal basis in Chapter VII of the Charter, the SC’s referral of the crimes in Darfur is conditioned on the determination that they continue to constitute a threat to international peace and security. Where the ICC obtains jurisdiction over a case by virtue of such a Security Council referral, its jurisdiction is considered much stronger and truly universal, rendering irrelevant the consent of the state where the crime occurred. The Darfur situation is

²⁵ *Ibid.* 113, 114

²⁶ This is so because the SC is a political body with its five permanent members having political interests that conflict with their responsibility to refer cases to the ICC and maintain peace.

²⁷ *Ibid.* 114. This explains why the situation of Syria has not been referred to the ICC despite SC members’ desire to, since Russia and China have vouched for Syria protecting Al- Assad.

²⁸ *Ibid.*

²⁹ Juan, J. A. 2015. “Surrender of Suspects to the International Criminal Court : The Case of Libya. *Journal of International Criminal Justice*, 12

³⁰ Corrinier, H. 2006. “The UN Security Council’s referral of the Crimes in Darfur to the International Criminal Court in Light of U.S Opposition to the Court : Implications for the International Criminal Court’s Functions and Status. *Berkeley Journal of International Law*, 24(4): 3

the third case on the docket of the ICC, but the first in which the court's jurisdiction is premised on a SC referral pursuant to article 13(b) of the Rome statute.³¹

The UNSC's power to refer potential prosecutions to the ICC in situations outside the court's treaty-based territorial and nationality jurisdiction helps deter the perpetration of genocide, war crimes and crimes against humanity everywhere in the world. It is unclear if referral to the ICC has had any effect in preventing the commission of further crimes in Darfur or Libya. The Council should use referrals to ensure accountability for serious crimes, and to strengthen the general deterrent effect of International Law, rather than as a primary tool to address breaches of the peace.³²

The problem in the Al - Bashir case is that although Sudan is not a party to the ICC Statute, the case arises out of a SC referral. The SC Resolution 1593 decided that Sudan must cooperate fully with the Court but did not explicitly make the statute binding on it.³³

b. Deferral of situations from the ICC

Article 16 provides that, "no investigation or prosecution may be commenced/ proceeded with under this statute for a period of 12 months after the SC, in a resolution adopted under Chapter VII of the Charter of the UN, has requested the court to that effect: that request may be renewed by the Council under the same conditions".³⁴ The SC has power to delay or suspend action of the ICC in a particular matter.³⁵

The power of the SC under article 16 is however the one that has been touted as the most serious example of political interference. Under its terms, the SC may decide to suspend any investigation or criminal proceedings in progress at the ICC for a period of 12 months, which is renewable.³⁶

Beginning in late 2010, the government of Kenya sought a deferral of the investigation by the SC under article 16 of the Rome Statute, claiming the political ICC cases could be handled by a credible local mechanism. This request was endorsed by the AU in January 2011, with the council carrying on an interactive dialogue with Kenya on 18 March 2011, and further discussing the situation informally on 8, April, but in the end taking no action. Kenya followed the proper procedure of challenging the admissibility of ICC on potential domestic prosecution but this was rejected by the ICC's Pre – Trial Chamber in May 2011.³⁷

The SC's referrals are arguably problematic because a State that has not ratified the Rome Statute is able to participate and vote in the SC's meetings regarding a matter that is referred to the ICC. The SC has so

³¹ *Ibid.* 3-4

³² Lawrence, M. 2012. "The UN Security Council and the International Criminal Court : Towards a more Principled Relationship. *Friedrich Ebert Stiftung*, 1

³³ Dapo, A. 2009. "The Legal Nature of the Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities". *Journal of International Criminal Justice*, 340

³⁴ Article 16, Rome Statute of the ICC

³⁵ Daniel, N. N. 2007. "The Relationship Between the International Criminal Court and the United Nations Security Council. *Zeitschrift fur internationae Strafrechtsdogmatik*, 502

³⁶ Mateus, K. *op.cit.*, footnote 24. 114

³⁷ Lawrence, M. *op.cit.*, footnote 32 .11

far only made referrals to the ICC but has never taken any tough fellowship steps to enforce compliance with the ICC. There is arguably less progress on cases (with the exception of the Bashir's case) referred to the ICC by the SC.³⁸

The SC plays a great role in the exercise of the Court's jurisdiction by referring and deferring cases of violations to/from the court. There has been a number criticisms and accusations of the SC actions as being unfair or partial as will be seen in the subsequent paragraphs.

3. PARTIALITY IN SECURITY COUNCIL'S REFERRALS AND DEFERRALS

One of the emerging challenges has not only involved the seemingly preferential role of the SC in exercising its deferral power. It has also involved the play of power in which the UNSC has referred some cases and not others. Syria is one such example of an instance of UNSC inaction. Over the past years, Syria has been engulfed in a violent conflict with more than 250,000 besieged civilians and a death toll surpassing 100,000. Both government forces and non-government armed groups have committed widespread attacks, including murder, rape, torture and enforced disappearance.³⁹ In response, various resolutions have been presented to the UNSC to refer the situation to the ICC, but have all been vetoed. Sixty-five UN members' states, of which several were African States, co-sponsored a draft resolution for adoption asking the UNSC to refer the situation to the ICC. Once again this resolution was vetoed by China and Russia, prompting questions regarding the play of political interests in the dynamics between the UNSC and the ICC.⁴⁰ The UNSC charged with protecting international peace and security has seen only failures in Syria during the years of war. Russia, backed by China has vetoed seven different resolutions.⁴¹ Ten non-permanent SC countries have circulated a compromise resolution demanding a full investigation of the suspected chemical attack in Syria in a move designed to avoid a clash with Russia.⁴²

Dapo Akande and Max du Plessis⁴³ have taken up the problem of article 13 referrals as they refer to the African Union (AU), ICC and UNSC and issued a range of recommendations from the need to promote more effective cooperation and a deeper engagement between ICC state parties, the ICC and the UNSC and the need for the AU and the UN to communicate with one another. Lawrence Moss⁴⁴ examined the referral and deferral powers of the UNSC and issued concluding recommendations ranging from the establishment of a SC working group on referrals, recommending that the UNSC work to promote justice

³⁸ Moses, R. P. 2011. "How Effective the International Criminal Court has been: Evaluating the work and progress of the International Criminal Court". *Notre Dame Journal of International Comparative and Human Rights Law*, 96. Three out of the five permanent members of the SC are not party to the ICC Statute and this poses serious problems to the court.

³⁹ Kamari, M. C. and Sarah – Jane, K. 2014. "The Legal Politics of the article 16 Decision : The International Criminal Court, the UN Security Council and Ontologies of a Contemporary compromise. *African Journal of Legal Studies*, 298

⁴⁰ *Ibid* .298,299

⁴¹ <http://www.google.cm/amp/s/amp.cnn.com/cnn/2017/04/10/politics/un-security-council-syria/index.html> last accessed: 29/11/2020. SC Vetoed resolutions; S/2017/315 of 12 April 2017; S/2016/1026 of 5 December 2016; S/2016/846 of 8 October 2016; S/2014/348 of 22 May 2014; S/2012/538 of 19 July 2012; S/2012/77 of 4 February 2012; and S/2011/612 of 4 October 2011. Available on <https://en.m.wikipedia.org/wiki/vetoed-united-nations-security-council-resolutions-on-syria> last accessed: 29/11/2020

⁴² <http://www.google.cm/amp/www.aljazeera.com/amp/news/2017/04/security-council-syria-attack-170406230140973.html> last accessed: 29/11/2020

⁴³ Dapo, A. et al. 2010. "Position Paper : An African Expert Study on the African Union Concerns About Article 16 of the Rome Statute of the ICC. *Institute for Security Studies*, 2010 in Clarke and Koulen, *op.cit.*, footnote 39.299,300

⁴⁴ Lawrence, M. *op.cit.*, footnote 32, in Clarke and Koulen, *op.cit.*, footnote 39 .300

and accountability and enhance the deterrent effect of the court. Tim Murithi⁴⁵ recommended that the AU and the ICC “reorient their stances” towards one another, identified a need for enhanced dialogue and engagement, and recommended that a political liaison officer be appointed at the ICC to facilitate communication with political organizations such as the AU, while Makau Mutua⁴⁶ has suggested that the SC should generally resist using their deferral powers and politicizing the work of the ICC. The perceived tension between the political and the legal is neither new nor unique.⁴⁷

3.1. FAILURE TO REFER OTHER CASES OF VIOLATION TO THE ICC

Through their presence at the SC, a few states have the power to decide which situation 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.⁴⁸

A number of situations that might have been referred by the Council to the ICC have not been, often because the state concerned has veto wielding allies amongst the P5 council members. Situations involving Chechnya, Gaza or Burma, for example, would never be referred to the ICC as a result of strong allegiances held by P5 members. A UN panel of Experts concluded that up to 40,000 civilians were killed at the conclusion of the conflict between the government of Sri Lanka and Tamil Rebels during the period 2008 – 2009, with war crimes probably having been committed by both sides to the conflict. There has been no effort at the council to make an ICC referral, despite the continuing failure of the government to launch an adequate domestic investigation.⁴⁹

A particularly clear example is the council’s failure to even consider a referral of the current situation in Syria to the ICC, despite factual and procedural preconditions at least as pronounced as those that existed in Darfur and Libya. Since March 2011, thousands of largely peaceful protestors have been killed by Syrian security forces, with many more being detained and tortured. A special session of the UN Human Rights (HRC) in April 2011 condemned “the use of lethal violence against peaceful protestors by the Syrian authorities” and asked the Office of the High Commissioner for Human Rights (OHCHR) to send an investigatory mission. Based on the report of the OHCHR mission, the High Commissioner in her briefing to the SC encouraged the Council to refer the situation in Syria to the ICC. States drafting a SC resolution on Syria originally proposed a reference ‘noting’ the recommendation of an ICC referral, but

⁴⁵ Tim Murithi heads the justice and Peace building program at the Institute for Justice and Reconciliation in Cape Town, South Africa. He is also extraordinary Professor of African Studies, at the Centre for African studies, University of Free State, South Africa.

Tim, M. 2013. “The African Court and the International Criminal Court : An Embattled Relationship ?”. *The Institute for Justice and Reconciliation*, 2013 in Clarke and Koulen, *op.cit.* footnote 39. 300.

⁴⁶ He is a Kenyan – American Professor of Law. In December 2014, he resigned as Dean of the University of Buffalo Law School after a controversial 7 year term.

⁴⁷ Kamari M. and Sarah, Koulen. *op.cit.*, footnote 39 .300

⁴⁸ Amella, C. 2015. “The Politics of International Justice: The Security Council’s Impact on the Independence, Effectiveness and Legitimacy of the International Criminal Court”. *McGill Center For Human Rights and Legal Pluralism*, 3(2):15

⁴⁹ Lawrence, M. *op.cit.*, footnote 32 .11

even this was removed from the resolution tabled at the SC and vetoed by Russia and China in October 2011.⁵⁰

Despite this overwhelming factual and procedural pre-condition for referral, this remained politically impossible at the SC as a result of veto powers. A second draft SC resolution condemning gross violations in Syria, also vetoed by Russia and China on February 2012, omitted any reference to a possible ICC referral as well.⁵¹ Russia has in the past expressed objections to involving the ICC, as far back as January 15, 2013, describing efforts to seek a referral as “ill – timed and counter-productive”. The Russian - UN Ambassador, Vitaly Churkin, told the media that Russia’s position had not changed and that the bid to involve the court was, in Russia’s view, not a ‘good idea’.⁵² Till date, Russians still hold on to this view by vetoing the decision to refer the situation in Syria to the ICC during the SC conference April 2017.⁵³

With Russia and China vetoing a UN SC resolution to refer the situation in Syria to the ICC, it is time once more to look for other avenues. The ICC Prosecutor, Fatou Bensouda, lent her voice in support of accountability for crimes in Syria but acknowledging that without a referral the court was powerless.⁵⁴

On December 27, 2008, the Israel Defence Force (IDF) launched ‘Operation Cast Lead’ into Gaza in an attempt to thwart continuing attacks by Hamas and other Palestinian organized armed groups.⁵⁵ Following Israel’s “Operation Cast Lead”, the UN called upon the Israeli and Palestinian authorities to conduct investigations and prosecutions of international crimes in accordance with international standards. The measures that the Israeli authorities undertook when carefully examined fall short of international standards. When examined under the lens of the admissibility criteria of the complementarity principle under article 17 of the ICC Statute, this deficient practice emerged as part of a broader policy intended to shield perpetrators and maintain a climate of impunity for those committing international crimes. The need to find Alternative Avenue to provide victims with access to justice called for an interrogation of the role of international criminal justice mechanisms, such as the ICC, in the Palestinian – Israeli conflict.⁵⁶ Thus, irrespective of how one regards the issue of Palestinian Statehood, there is no doubt that the council has the power to refer the situation in Palestine to the ICC. So far, which it has not done. Still, a SC referral with respect to the Israeli-Palestinian conflict seemed unlikely as any such resolution would almost certainly be vetoed by the United States.⁵⁷

⁵⁰ *Ibid.*

⁵¹ *Ibid.*12

⁵² www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court. last accessed: 29/11/2020

⁵³ www.cnn.com/news last accessed:29/11/2020

⁵⁴ www.opendemocracy.net/opensecurity/luke-moffett/syria-and-international-criminal-court-justic-denied. last accessed: 29/11/2020

⁵⁵ Michael, N.S. 2011. “Investigating Violations of International Law in Armed Conflicts”. *Harvard National Security Journal*, 2(1):31

⁵⁶ Valentina, A. and Sharon, W. 2012. “Israeli’s unwillingness? The Follow-Up investigations to the UN Gaza Conflict Report and International Criminal Justice”. *International Criminal Law Review*, 905

⁵⁷ Daniel, B. and Ronen, P. 2010. “Israel, Palestine and the ICC. *Michigan Journal of International Law*, 32(5):123. On 18 February 2011, the US vetoed a SC resolution condemning all Israeli settlements established in occupied Palestinian territory

The Sudanese government perceived the UNSC to be an instrument of American and British power. The same UNSC that has repeatedly condemned Khartoum, imposed an arm embargo on Darfur, demanded it disarm the *Janjaweed* and accepted UN peacekeepers has also referred Darfur to the ICC. Khartoum simply refused to believe that the ICC is independent.⁵⁸

The comparison of Libya's consensual referral to the blatant refusal to refer the Syrian case highlights the council's clear case selectivity.⁵⁹ In determining whether to make a referral to the ICC, the Council should act to promote justice and accountability as there is a considerable likelihood that consistency in prosecuting perpetrators of serious crimes before the ICC will greatly enhance the deterrent value of the court and serve the council's long term goal of maintaining peace and security.⁶⁰

Thus, there is enough reason for the Prosecutor to intervene in Palestine and for the SC to refer Israel and Syria but this has not done showing the bias nature of the SC.

4. THE POLITICIZATION OF THE COURT BY THE SECURITY COUNCIL

The perceived tension between the political and the legal is neither new nor unique. In the various tensions and contestations between the ICC and the AU, there is a similar division at play between the 'law' and 'politics', with the ICC embodying what is often seen as law and the SC characterized as decidedly political, undemocratic and non-transparent in nature.⁶¹ According to Sarah Nouwen and Wouter Werner⁶², the ICC is inherently and inextricably political in so far as it demarcated friends and enemies. Nevertheless, various statements by agents of the ICC reflect such an effort to demarcate law and politics. For example, in a 2008 article by the former Prosecutor of the ICC, Luis Moreno Ocampo; "The Prosecutor's duty is to apply the law without bowing to political considerations, and I will not adjust my practices to political considerations. It is for political actors to adjust to the law... we have no Police and no Army but we have legitimacy".⁶³

In an interview in early 2014, current Prosecutor, Fatou Bensouda, insisted that "political and extraneous" considerations played no role in the decisions of her office.⁶⁴ Politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics look only to

since 1967 as illegal, saying that while it agreed that the settlements are illegitimate, the resolution harmed chances for peace talks. Available on <http://www.un.org/apps/news/story.asp?newsid=37572#.wa3pgx5wzag> last accessed: 29/11/2020

⁵⁸ Alex, W. 2008. "Darfur, the Court and Khartoum : The Politics of State Non-Cooperation". *Royal African Society*,.34

⁵⁹ Amella, C. *op.cit.*, footnote.48.

⁶⁰ Lawrence, M. *op.cit.*, footnote. 32. 13

⁶¹ Kamari , M. C. and Sarah – Jane, K. *op.cit.*, footnote 39. 301

⁶² Sarah Nouwen is a University Lecturer in Law at the University of Cambridge. She is also a fellow of the Lauterpacht Centre for International Law and of Pembroke College. Wouter Werner is Professor in Public International Law (University of Amsterdams, Netherland).

Sarah, N. and Werner, W. 2011. "Doing Justice to the Political : The International Criminal Court in Uganda and Sudan". *European Journal of International Law*, 941 - 965

⁶³ Luis, M. O. 2008. "The International Criminal Court : Seeking Global Justice. *Western Reserved Journal of International Law*, 215 – 225 in Clarke and Koulen. *op.cit.* footnote 39 .301-302

⁶⁴ Interview with Fatou Bensouda, *New African Magazine*, London, 28 January 2014 in Clarke and Koulen, *op.cit.* footnote 39. 302

expediency. The former is neutral and objective, the latter, the uncontrolled child of competing interests and ideologies.⁶⁵

Referrals of conflict situations to the ICC by states parties and the UNSC result in one-sided prosecutions that reflect the preferences of those who refer the situation and result in dangerous impunity gaps. In instances of UNSC referrals, cases are limited to those that the major powers feel are dispensable and undesirable.⁶⁶ According to Judith Shklar's analysis of legalism,

"Politics is regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics look only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies".⁶⁷

Many States and NGOs argued during the Rome Statute negotiations that the ICC's independence could only be ensured if the court's authority was not tied to the UNSC while others thought that the UNSC will empower the court with respect to states cooperation and give it added credibility.⁶⁸ The UNSC has impeded the court's ability to be impartial and independent. The UNSC has directly or indirectly prevented the court from pursuing situations and cases that involved its members and their allies or for which political priorities superseded a resolute commitment of justice. The SC can do so by refusing to refer certain situations that fall outside the court's jurisdiction but still clearly warrant investigative scrutiny based on the gravity of the crimes. Certainly, the court's critics accuse it of such selective bias by highlighting its inability to move forward with investigations into the situations in Sri Lanka, Palestinian territories, and Syria because of some SC members' political and strategic interests. Regarding the ongoing conflict in Syria, for example, the UNHR council contended that the Syrian government has committed crimes against humanity, that both parties to the conflict have committed war crimes and that a 'referral to justice is imperative'. The UNSC has not yet, however, referred the situation to the ICC because of Russia's support for the Assad Regime.⁶⁹

Linking the SC to the court invites politicization. The UNSC has already attempted to limit the scope of the ICC's interventions and retained the power to defer investigations. Elaborating on this issue, Louise Arbour, Former Chief Prosecutor of ICTY and ICTR, and President of the International Crisis Group, has warned that:

"The increasing entanglement of justice and politics is unlikely to be good for justice in the long run. To make criminal pursuits subservient to political interests, activating and withdrawing cases that political imperatives dictate, is unlikely to serve the interest of the ICC which must above all establish its

⁶⁵ Shklar, J. N. 1964. *Legalism : Law, Morals and Political Trials*. Cambridge: Harvard University Press, 11 in Clarke and Koulen. op.cit., footnote 39. 302

⁶⁶ Alan, T. 2014. "The International Criminal Court and the Politics of Prosecutions". *International Journal of Human Rights*, 2

⁶⁷ *Ibid* .3

⁶⁸ *Ibid* .5

⁶⁹ *Ibid* .5-6

credibility and legitimacy as a professional and impartial substitute for deficient national systems of accountability. I'm not sure that partnership with the SC is the best way to attain these objectives".⁷⁰

Referrals by the UNSC are invariably political because this body is a political organ of the UN. It has been argued that while the UNSC was very fast in referring the Libyan situation to the ICC, it has not referred that of Syria. Is it surprising then, if some people see the Prosecutor... rightly or not... as a puppet of the global powers?"⁷¹

The UNSC has a similar legal capacity (*Locus Standi*) as a state party. It may trigger an investigation, challenge its continuation or discontinuation and ensure that international cooperation works.⁷² The UNSC interferes with the independence of the court in that it may request the ICC not to investigate or proceed with a prosecution when it concludes that judicial action or threat of it might harm the council's policy.⁷³ Under article 16 of the Rome Statute, such a request stops investigation or prosecution that is already underway.⁷⁴ Critics questioned why the ICC seemed to be active only in Africa and not elsewhere in the world. They draw the inference that the court seemed to exercise its mandate only against weak and poor states.⁷⁵ They wonder why USA which is the most 'economically and militarily' powerful state in the world has refused to accede to this court and also why their soldiers are committing atrocities with impunity. "The real point here is not about being a super power but the point should be to end impunity...that is the line the ICC should be following".⁷⁶ The USA remains one of the major opponents of the court. It has worked hard to ensure that US citizens are not brought to the court.⁷⁷ The ICC Prosecutor is under constant pressure to chastise and embarrass the world powers and powerful countries, to indict members of the Chinese politburo for their prosecution of Tibetans.⁷⁸ It is also wondered why a state like USA or china (which has not yet ratified the Rome statute) should have a right to vote in the UNSC to refer a situation to the ICC. "A selective application of justice would undermine the universality of treatment which the law presumes."⁷⁹ Recently, the Prosecutor's attempt to investigate the crimes committed by the US forces in Afghanistan met with a visa ban for her and other workers of the court in an attempt to paralyzed her efforts.

On the other hand, several arguments have been advanced in support of the ICC or to challenge the criticisms that the court has been politicized but it is not difficult to dismiss them. It has been argued that the focus of the ICC on Africa should be blamed on the weaknesses of the African national jurisdictions

⁷⁰ *Ibid.* 11

⁷¹ www.findarticles.com last accessed : 20/12/2020

⁷² www.mpil.de/shared/data/pdf/pdf/impunityb/roben_7.pdf. last accessed: 20/12/2020

⁷³ Article 16, Rome Statute of the ICC, 1998

⁷⁴ www.mpil.de/shared/data/pdf/pdf/impunityb/roben_7.pdf. last accessed: 20/12/2020

⁷⁵ www.communicatingjustice.org/en/stores last accessed: 20/12/2020

⁷⁶ Njukeng, G. A. 2014. "A Critical Appraisal of the Protection of Fair Trial rights in the International Criminal Court. Unpublished LLM Thesis, Department of Law, University of Buea, 174

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* 174-175

⁷⁹ *Ibid.* 175

and not on the bias of the ICC Prosecutor.⁸⁰ This is because states with developed national judicial systems are able to exercise jurisdiction over their citizens who commit genocide, crimes against humanity and war crimes. Hence, Africans are the main accused persons before the ICC today which creates an impression of an ‘uneven justice’.⁸¹ However, it appears this argument is only partially true because ICC prosecutions are being politicized even by African leaders who use such an option as a weapon against their opponents.⁸² The politicization of the prosecution is an old practice in Africa.⁸³

It has also been argued that the politicization of the ICC is inevitable because suspects and accused persons before the ICC are generally politicians and war leaders. The work of the court inevitably takes place in the context of brutal power politics on the one hand and human rights on the other.⁸⁴ The ICC is often perceived as a political vehicle (although it is an international judicial body), because it has to deal with what is fundamentally a political problem – a conflict. It is submitted that the criticism of the ICC for being politicized go beyond these circumstances and are focused on the point that the court, albeit the Prosecutor (at least for some time) has focused on weak states especially African countries but it is more due to the work of the prosecutor that the image of the court is tainted with bias.⁸⁵

Thus, from its very inception, the court had been politicized by giving the SC a major role to play as far as the jurisdiction of the court is concerned knowing fully well three of the five permanent members are not signatories. It would therefore not be an overstatement to say that it was an error to have given the SC such powers because of the bias, human rights violations and impunity as a result of power politics by the SC members.

5. SECURITY COUNCIL IMBALANCE AND VETO POWERS

A number of states raised the issue of the veto in the General Assembly’s debate. Two states, Venezuela and Bolivia, expressly called for an abolishment of the veto power. Also, the President of the General Assembly (GA) wrote in his concept note on responsibility to protect: “It is the veto and the lack of UNSC reform rather than the absence of a responsibility to protect legal norm that are the real obstacles to effective action”.⁸⁶

An obligation to vote positively is incumbent on all members of the Council. However, the permanent members are in a legally different position to the non-permanent ones because each of them can actually hinder a decision by itself through the veto. A non-permanent member does not have the power to block a council decision on its own. Its negative vote can only co-determine the outcome, on SC policies. So it

⁸⁰ Tamfuh, .N. W. 2008. “The International Criminal Court : Creation, Competence and Impact in Africa. *African Journal of Criminology and Justice Studies*, 3(2):116

⁸¹ *Ibid.*

⁸² Fekade, A. 2010. “Prosecution of Crimes against humanity and genocide in Africa : Comparative Analysis”. Unpublished LLM Thesis, Law School Graduate, Addis Ababa University , 7

⁸³ Okechukwu, O. 2007. “The challenges of International Prosecutions in Africa”. *Fordham International Law Journal*, 31(2):360

⁸⁴ www.dw.de/article/0160629300.html. last accessed: 20/12/2020

⁸⁵ Njukeng, G. A. op.cit., footnote. 76

⁸⁶ Anne, P. 2011. “The Security Council’s Responsibility to Protect”. *International Organisations Law Review*, 14

seems that the obligations falling on the non-permanent members should be somewhat less strict than for the P5 (permanent members).⁸⁷

Under the rule of law, the exercise of the veto may under special circumstances constitute an ‘*abus de droit*’ by a permanent member.⁸⁸ A related argument⁸⁹ is that the exercise of the veto is an “*acte de gouvernement*”. So the argument runs, the veto is not subject to legal standards but remains purely in the political realm while others submitted that the veto is a procedural right and can therefore be abused.⁹⁰

The composition of the SC, the veto powers of its permanent members, and its need to fashion immediate remedies in crisis situations can endanger the independence and legitimacy of the ICC, particularly if the council’s decisions are seen as politically motivated. In using its power of referral, the council should apply criteria and processes that are as objective and consistent as possible.⁹¹

The SC ‘power of veto’ refers to the veto power wielded solely by the five permanent members of the UNSC (China, France, Russia, UK and US), enabling them to prevent the adoption of any ‘substantive’ draft council resolution, regardless of the level of international support for the draft. The veto is exercised when any permanent member, the so-called ‘P5’ casts a negative vote on a ‘substantive’ draft resolution (this originated from the League of Nations where both permanent and non-permanent members had veto powers).⁹² The UNSC veto power was established in order to prohibit the UN from taking any future action directly against its principal founding members. This power is granted to the P5 by article 27⁹³ of the UN Charter.

While China, Russia and U.S.A have exercised their veto power in the 21st century, neither France nor the UK has. The following contains situations where the five permanent members of the UNSC exercised their veto powers;

- April 2017, Russia vetoed a UNSC Resolution threatening sanctions against Syria.⁹⁴
- March 15, 2014: Russia vetoed a Resolution condemning as illegal a referendum on the status of Crimea.
- July 19, 2012: China and Russia vetoed a Resolution threatening Chapter VII sanctions against Syria.
- February 18, 2011: The US vetoed a draft resolution condemning Israeli settlements in the West Bank.⁹⁵

⁸⁷ *Ibid* .25

⁸⁸ *Ibid* . 27

⁸⁹ Lagrange, E. 2002. La Representation Institutionnelle dans l’Ordre International, The Hague : Kluwer Law International, 215 – 243 in Anne, P. op.cit.footnote.86. 28

⁹⁰ *Ibid*.

⁹¹ Lawrence, M. op.cit. footnote 32. 1

⁹² http://en.wikipedia.org/wiki/united_nations_security_council_veto_power. last accessed: 24/12/2020

⁹³ “Each member of the SC shall have one vote ; Decisions of the SC on procedural matters shall be made by an affirmative vote of nine members.

⁹⁴ <http://www.google.cm/amp/s/amp.cnn.com/cnn/2017/04/10/politics/un-security-council-syria/index.html> last accessed: 24/12/2020

Critics and politicians alike have criticized this council for its small size and exclusive nature, its relation with the GA, its working methods, and its undemocratic structure. The most criticism has been directed at the infamous ‘power of veto’, namely the ability of the five permanent members of the council to quash any non-procedural matter with their negative vote, irrespective of its level of international support.⁹⁶

Since the establishment of the SC, permanent members have used their powers of veto in accordance with their national interests. The use of that power rapidly distanced from the initial reason for which it was included in the UN Charter, namely, preventing the UN from taking direct action against any of its principal founding members.⁹⁷ A look at the use of veto in the last two decades revealed that although being cast less often, the veto is still exercised for self-interest of allies.⁹⁸

The UNSC is of unique importance and authority in efforts by nations to maintain international peace and security, yet it is widely viewed as having had mixed track record. The council urgently needs to be reformed. The failure to reform the council raises one of history’s abiding and most dangerous questions: must we await a serious breakdown before wisdom which is available now is acted upon?⁹⁹

There is need to reform the SC for all continents to be represented and also the veto system to prevent abuse and political interest overriding. The majority voting system should be implemented (two-third majority) not the one man veto system.

6. CONCLUSION

Countries from the global south frequently complained of skewed power relations in the UNSC. This imbalance has affected the ICC because under the Statute of the ICC, the SC has the power to refer cases to the court. The SC has referred some cases – Libya and the Sudanese Region of Darfur, but not others, such as Israel and Syria. The fact that the two situations that have been referred come from Africa tends to support the suggestion that there is an anti - African bias.¹⁰⁰ Thus, the politicization has greatly affected Africa and the world at large. Recent trends have revealed that for the ICC to exercise its functions very well there is need to reform the SC for each continent to be properly represented in order to deal with the problem of partiality and politicization and for the veto system to be replaced with the majority voting system. It is true that whether the ICC addresses situations in non-states parties is outside the court’s control and that criticism of such political and biased selectivity should be made against the UNSC and not the court itself. However, the UNSC forms an integral part of the ICC and its actions cannot be completely separated from the court and therefore SC actions are equally attributed to the court. Its lack of objectivity has led to impunity, promoted human rights violations, accusation of bias by African States, prevented prosecutions by the ICC and perpetrators can freely roam the globe knowing that the hand of international justice isn’t long enough to reach them.

⁹⁵ http://en.wikipedia.org/wiki/united_nations_security_council_veto_power. last accessed: 24/12/2020

⁹⁶ Sahar, O. 2011. “The United Nations Security Council : Its Veto Power and Its Reform”. *CPACS Working Paper* No.1511, 3 also available on <http://www.arts.usyd.edu.au/centres/cpacs> last accessed: 24/12/2020

⁹⁷ *Ibid*

⁹⁸ *Ibid*

⁹⁹ Richard, B.C. 2012. “Reform of the United Nations Security Council”. *Penn State Journal of Law and International Affairs*, 1(1): 23

¹⁰⁰ Max , P. et al. 2013. “Africa and the International Criminal Court”. *Chatham House*, 2