

**Through a Glass Darkly: the ICC, the UNSC and the Quest for Justice in
International Law**

Abstract

Despite the aspirations of the International Criminal Court (ICC), it is unlikely to achieve an end to impunity for crimes of concern to the international community without acknowledgement of and due engagement with the politics of international criminal law. A major threat to the legitimacy of the Court is its relationship with the United Nations Security Council (UNSC). UNSC referrals of conflict situations under Article 13(b) of the Rome Statute remain subject to geo-political considerations. The exercise is thus arbitrary at best, and may render the ICC an instrument of political coercion at worst. An apolitical approach to conflicts given this context is almost antithetical to justice and has already given rise to tensions between the Court and some affected member states. Managing the asymmetry created by UNSC referrals and rethinking its seemingly unjustified encroachment in the affairs of less influential states should become the priority for the Court.

Keywords: International Criminal Court - United Nations Security Council –Article 13(b) referrals – state consent – politics of international criminal justice.

Introduction

Despite the aspirations of the International Criminal Court (ICC or Court), it is unlikely to achieve an end to impunity for crimes of concern to the international community without acknowledgement of and due engagement with the politics of international criminal law. The relationship of the Court with the United Nations Security Council (UNSC) poses a serious threat to the legitimacy of the institution and the fundamentals of international criminal justice and law. UNSC referrals of conflict situations under Article 13(b) of the Rome Statute remain subject to geopolitical considerations and the security interests of the Security Council's five permanent members. The exercise is thus arbitrary at best, and may render the ICC an instrument of political coercion at worst. An apolitical approach to conflicts given this context is almost antithetical to justice and has already given rise to tensions between the Court and some affected member states. Managing the asymmetry created by UNSC referrals and rethinking its seemingly unjustified encroachment in the affairs of less influential states should therefore become the priority for the Court.

This article reflects on concerns expressed by the African Union (AU) and a number of African States regarding the ICC's involvement in situations on the continent and concludes that some of these objections are in fact warranted and deserving of serious consideration. A serious cause for the rift between the AU and the ICC is the situation in Sudan which involved a civil conflict that broke out in the western region of the country and managed to attract the attention of the international community in late 2003. Following a UN Commission of Inquiry report on the conflict, the UNSC issued resolution 1593 in 2005 referring the situation to the ICC for investigation. It

was in the wake of this resolution, that the former Prosecutor of the ICC - Moreno Ocampo - issued two indictments for the sitting head of the Sudanese State Omer Hassan Al-Bashir in 2009 and 2010.¹ The latter of these concerned the crime of genocide. The outstanding arrest warrant against president Al-Bashir has given rise to contentious debates about the ICC and its relationship with African states ever since and has come to be seen as a symbol of the claimed African bias of the Court.² A serious concern of the AU in this respect is the issue of state consent as well as the implication this has for other international obligations such as public international law rules regarding the granting of diplomatic immunity to state officials.

In addition to issues of state consent and diplomatic immunity, the involvement of the UNSC in international criminal justice is perplexing given the Council's institutional attributes. As a political body originally charged with ensuring world peace and security under the umbrella of the United Nations (UN) system, it was essential that a limited number of states be given the responsibility, power and opportunity to make expeditious decisions to restrain the behaviour of states that threaten this international covenant of peaceful co-existence. This same body is, however, ill-equipped to decide matters of criminal justice given the fact that the UN institutional rules allows its permanent members (P-5) to exercise unfettered discretion over the Council's decisions through their veto powers. An unconstrained exercise of veto powers on decisions of referrals to the ICC has resulted in the creation of a hierarchy of

¹ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest (March 4, 2009), *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010).

² See e.g., Marshet Tadesse Tessema and Marlen Vesper-Gräske, 'Africa, the African Union and the International Criminal Court: Irreparable Fissures?', 56 FICHL Policy Brief Series, Torkel Opsahl Academic EPublisher (2016)

sovereignties where some countries are referred to the Court for violations of international law while others with similar situations are not referred depending on whether or not they have a friend on the Council. A case in point is the failure to refer the situation in Syria to the ICC. The selective enforcement of international criminal justice exercised by the UNSC undermines en masse the Court's independence, impartiality and the fundamental norm of equality before the law as well as claims of universalism underpinning the creation of international criminal tribunals, including the ICC. In addition, the ability of the UNSC to refer situations of conflict to the ICC sits in stark contrast with the fact that three of its veto-wielding permanent members remain safely outside the reach of the Court.

The central argument in this article is that the legitimacy costs incurred by the ICC as a result of its relationship with the UNSC are not unavoidable and can be addressed through the exercise of prosecutorial discretion. This can be achieved by declining to act on UNSC referrals so long as the majority of its permanent members remain outside the remit of the Rome Statute. Provided that such action is based on normative foundations of justice and the rule of law, declining to act on UNSC referrals would at worst serve as a delegitimizing tool of UNSC decisions and at best compel the Council to adopt a more consistent approach to ICC referrals.

The article addresses the above issues as follows: Section 1 outlines the problematic nature of UNSC referrals of parties who are not members of the Rome Statute to the ICC. Section 2 delineates the link between UNSC referrals, ICC legitimacy and state cooperation. And Section 3 suggests a way forward for managing the relationship with the Council.

1 UNSC Referrals and the Erosion of State Sovereignty and Individual Rights

This article draws on the African Union's (AU) open opposition of the ICC that reached its climax a couple of years ago.³ Early in 2017, the organization put forward recommendations for a road map on possible withdrawal from the Rome Statute.⁴ 33 of the 54 African countries that are member states of the AU are also ICC States Parties. Bearing in mind that the structure of the Court as well as its ability to administer international criminal justice effectively is almost entirely based on state consent,⁵ a threat of withdrawal of more than a quarter of its member states – whether actually acted upon or not - poses a serious existential risk to the Court.

The persistent reluctance of African states to arrest President Al-Bashir of Sudan despite numerous opportunities despite the outstanding arrest warrants against him from 2009 and 2010 is symptomatic of the legitimacy cost imposed on the Court because of its relationship with the Security Council. Further more, the seeming confusion of member states of the Rome Statute regarding their obligations towards the Court is reinforced by the AU's attempt to resolve the question of the legality of arresting the sitting head of a non-consenting state through mechanisms available in the Rome Statute as well as otherwise in international law. The ability of the UNSC to refer situations to the Court under Article 13(b) of the Rome Statute is the starting

³ Amy Cuzzolino, 'The Villain Has a Point', Law School Student Scholarship (2016) 674.

⁴ Cora True-Frost, 'Weapons of the Weak: The Prosecutor of the Icc's Power to Engage the Un Security Council', 44 *Fla. State. UL Rev.* (2016 - 2017) 261-324.

⁵ In the sense that the jurisdiction of the Court is pre-determined when it comes to its States Parties.

point for understanding this relationship.⁶ It is therefore fitting to analyse this provision in greater detail.

Article 13 provides for the exercise of jurisdiction by the Court and subsection (b) allows it to look into ‘A situation in which one or more of such crimes appears to have been committed [when it] is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.’ The UNSC is able to refer such situations presumably because it has ‘primary responsibility for the maintenance of international peace and security’⁷ and does so through the exercise of its powers under Chapter VII of the UN Charter which allows it a monopoly over the use of force as well as taking measures which may enable it to exercise its function.⁸In *Prosecutor vs. Dusko Tadic* (1995), the ICTY (International Criminal Tribunal for the Former Yugoslavia) Appeals Chamber determined that the creation of the tribunal by the UNSC was pursuant to its powers under Article 41.⁹ The same would seem to apply to UNSC referrals under Article 13(b) of the Rome Statute.

Another aspect of the relationship between the ICC and the UNSC is that the latter is also able to defer situations before the Court pursuant to Article 16 of the Rome Statute. The UNSC has already invoked this provision when it issued its resolution No. 1422 requesting that the Court spare UN peacekeepers belonging to states not

⁶ Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002 (1998) [hereinafter the ‘Rome Statute’].

⁷ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.un.org/en/charter-united-nations/> (Last accessed February 7th, 2019) [hereinafter UN Charter or Charter], Article 24(1).

⁸ Ibid, Article 39.

⁹ *Prosecutor v. Dusko Tadic*, Case No. (IT-94-1), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (October 2, 1995), ICTY Appeals Chamber, available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (last visited December 15, 2018).

party to the Rome Statute from its prosecutions.¹⁰ Whether or not such use was in accordance with the intentions of the drafters of the Rome Statute is subject to debate,¹¹ but the invocation of the deferral mechanism in Article 16 to protect nationals of non-consenting states is indicative of a general asymmetry in the treatment of nationals from different states (not party to the Rome Statute) when it comes to the commission of crimes under the jurisdiction of the ICC.

Other than through referrals by the UNSC, the ICC is only able to exercise jurisdiction over war crimes, crimes against humanity or genocide¹² if a situation involving a State Party is referred to it by another State Party or is initiated by the Prosecutor following her *proprio motu* powers.¹³ However, and according to Article 12 of the Rome Statute, both these triggers of jurisdiction are subject to the established tenets of exercising criminal jurisdiction in Public International Law; namely the territorial principle, and the nationality principle. The difficulty with UNSC referrals is that they extend the jurisdiction of the ICC to non-member States as well. This mechanism was included in the Rome Statute to ensure the widest reach possible for the Court.¹⁴ What would become clear by the end of this article is that ensuring such a reach entails a necessary trade-off of legitimacy for short-term efficiency.

¹⁰ Security Council, UN Doc. S/RES/1422 (2002) at para. 1.

¹¹ Zsuzsanna Deen-Racsmany, 'The Icc, Peacekeepers and Resolution 1422: Will the Court Defer to the Council?', 49/3 *Netherlands International Law Review* (2002) 353-88.

¹² This analysis is not concerned with the jurisdiction of the ICC over the crime of aggression as it is subject to a distinct jurisdictional regime under the Rome Statute. In addition, the three categories of war crimes, crimes against humanity and genocide form a normative unit suitable for analysis in that they seek to enforce standards of international humanitarian law and related norms which are often breached by a state in its treatment of its own citizens and as such have wide-reaching implications for the sovereignty of these states.

¹³ Rome Statute *supra* note 6, Articles 13-15.

¹⁴ Louise Arbour, 'The Relationship between the Icc and the Un Security Council', 20/2 *Global Governance: A Review of Multilateralism and International Organizations* (2014) 195-201.

The effect of the trigger of jurisdiction of the ICC in Art 13(b) as interpreted by the Court itself, puts into question the fundamental principle of state consent when it brings into the ambit of a treaty the actions of states that did not agree to be bound by it. The ICC Pre-Trial Chamber II (PTC II) deciding on the issue of the failure of the Democratic Republic of Congo to arrest President Al-Bashir of Sudan during a visit to the country invoked Article 25 of the UN Charter to argue that whatever immunity from arrest he is entitled to under international law principles¹⁵ have been implicitly waived by UNSC Resolution 1593 referring the situation in Sudan to the Court. Article 25 of the UN Charter states that ‘[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’.¹⁶ The decision of PTC II in this case was primarily based on the fact that the UNSC Resolution above provided for the cooperation of Sudan with the ICC and that the state therefore owes an obligation under the Charter to do so; not by waiving immunity as required by Article 98(1)¹⁷ but by arresting and surrendering any indictees to the Court.¹⁸ This interpretation of the effect of referrals by the UNCS to the Court practically gives the Council the power to create serious legal obligations binding on states regardless of their consent.

According to the ruling of PTC II above, the effect of the UNSC Resolution on Sudan is to put it in the position of a State Party that signed and ratified the Rome Statute

¹⁵ See Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), 14 February 2002, International Court of Justice, Judgement, I.C.J. Reports 2002, paragraphs 58-61.

¹⁶ UN Charter, Article 25.

¹⁷ Article 98(1) states that “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”¹⁷

¹⁸ Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court (*Prosecutor v Omar Hassan Ahmed Al Bashir*) ICC-02/05-01/09, 9 April 2014.

even though the State of Sudan exercised its sovereign right not to do so. The removal of head of state immunity pursuant to Article 27 of the Rome Statute applies to states parties by virtue of their state consent to this waiver and not because of a general operation of international law. The significance of this provision is that it creates fresh legal obligations on states parties (to waive diplomatic immunity) that international law does not ordinarily impose. The position in customary international law of the diplomatic immunity enjoyed by serving state officials including a sitting head of state is elucidated by the decision of the International Court of Justice in the Arrest Warrant Case.¹⁹ The ICJ was of the opinion that the said immunity applies regardless of whether or not the crime in question belongs to the category of crimes adjudicated by the ICC and has in fact invoked Article 27, in *obiter*, as a possible means of waiving immunity within the framework of the Treaty.²⁰ And while it might be tempting to argue that the case applies to the exercise of domestic criminal jurisdiction through the operation of Universal Jurisdiction, it is to be noted that the powers delegated to the ICC by the member states of the Rome Statute itself derives from this notion of Universal Jurisdiction and should therefore be confined to its limits under Public International Law.

Furthermore, the finding of PTC II against the Democratic Republic of Congo also means that so long as the treaty establishing the ICC provides for a mechanism whereby the UNSC can refer situations occurring in the territory of non-member States, then such referrals are by definition legal and binding on all such states unless they prove to be contrary to the purposes and the spirit of the UN Charter²¹; a very

¹⁹ Arrest Warrant Case *supra* note 15.

²⁰ *Ibid*, paragraph 61.

²¹ UN Charter *supra* note 7, Article 24(2).

high threshold for any UNSC decision to reach.²² The test for determining the legality of a UNSC resolution and hence its binding nature seems to be (i) whether or not the decision was made pursuant to a determination that a threat to peace or breach of the peace exists; and (ii) whether the decision was made in bad faith (i.e. not for the purpose of maintaining international peace and security).²³ In this respect, the referral of Sudan – a country with documented regional conflicts with allies of the US in the continent- seems innocuous compared to the US attempt to bring pressure on the Libyan regime to extradite two Libyan citizens following the bombing of an American airliner over Lockerbie in 1985.²⁴ The UNSC, determining there existed a threat to international peace and security four years after the incident, passed Resolution 748; thereby circumventing the obligations owed to Libya to resolve disputes under the framework of the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation as well as an active case at the International Court of Justice (ICJ) brought by Libya to enjoin the US and the UK from taking action to coerce it to surrender the accused.²⁵ Notwithstanding an initial victory at the ICJ which was of the opinion it had jurisdiction to judge the dispute between the respondent states and Libya despite UNSC Resolution 731 which preceded Resolution 748 in characterizing the situation as a threat to peace, it ultimately shied away from commenting on the legality of UNSC action.²⁶

²² Jose E Alvarez, 'Judging the Security Council', 90/1 *American Journal of International Law* (1996) 1-39.

²³ *Ibid* and Deen-Racsmany *supra* note 11.

²⁴ Gerald P Mcginley, 'The ICJ's Decision in the Lockerbie Cases' 22 *Ga. J. Int'l & Comp. L.* (1992) 577-607.

²⁵ *Ibid.*

²⁶ Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States of America*), 14 February 1992, International Court of Justice, Provisional Measures, *I.C.J. Reports* 1992 & Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States of America*), 27 February 1998, International Court of Justice, Preliminary Objections, *I.C.J. Reports* 1998.

The relationship of the ICC with the UNSC is complicated by the fact that the Council is a political body whose members are entitled to base their votes on political considerations.²⁷ The political theorist Hans Kelsen noted as early as 1950 that ‘[t]he veto right of the five permanent members of the Security Council may lead to a political system of more or less open clientage.’²⁸ He was also critical of the discernible contradiction between the ‘political ideology’ of the United Nations – with its focus on democracy and the sovereign equality of states – and its ‘legal constitution.’²⁹ I would add to that its concern for human rights and ensuring ‘respect for the obligations arising from treaties and other sources of international law.’³⁰

Decisions of the Council are constrained by few and indeed ambiguous limits for the exercise of the veto power granted to the five permanent members of the institution (the “P-5”).³¹ In the event any proposed decision threatens the national interests of either Russia, China, US, UK or France, any one of these states will be able to obstruct a UNSC resolution regardless of the normative foundations of the proposal and/or the implications of the decisions. While the civil-conflict situation in Libya, and which erupted following popular uprisings against the deposed head of state Gaddafi, was referred to the ICC by the UNSC pursuant to Resolution 1970,³² the very comparable Syrian situation that has been raging for over 7 years is yet to be

²⁷ Conditions of Admission of A State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 28 May 1948, International Court of Justice, Advisory Opinion, I.C.J. Reports 1948.

²⁸ Hans Kelsen *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (The Law Book Exchange, LTI Union, New Jersey 2000) p.275.

²⁹ *Ibid*, p. 277.

³⁰ Charter of the United Nations, *supra* note 10, the Preamble, para. 3.

³¹ Article 24 (2) of the UN Charter imposes on the UNSC a duty ‘to act in accordance with the Principles and Purposes of the UN Charter’. These principles are stipulated in Article 1 and include deference to principles of justice and international law, but in particular reference to the peaceful settlement of disputes. It is not clear whether this provides sufficient ground to constrain the actions of the UNSC in relation to international criminal justice.

³² Security Council, UN Doc S/RES/1970 (2011)

referred.³³ The difference between the two situations in Libya and Syria is that while the head of state in the first was already ostracised by the international community, the second conflict involved a Russian ally that was effectively blocking a political transformation likely to endanger Israel.³⁴ Hence, and despite the fact that the UNSC may be acting within a clearly defined international legal regime that grants it powers to take action to preserve peace and the international security,³⁵ it does so under a cloud of suspicion that it acts only in some situations and only against certain states. This was in essence the motion put forward by the defence in *Prosecutor v. Tadic* (“*Tadic*”) on the question of Jurisdiction.³⁶

In considering the role played by the UNSC in matters of international criminal justice, it is worth noting that the Council’s involvement did not start in earnest until the creation of the International Criminal Tribunal for the Former Yugoslavs (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994 respectively.³⁷ The UNSC invoked its Chapter VII powers to create the ICTY and charged it with investigating and prosecuting grave violations of International Humanitarian Law (IHL) that permeated the Yugoslav Wars of the 1990s. The ICTR was later created in the wake of the Rwandan genocide of 1994.

In *Tadic*, the ICTY determined *ultra vires* that the UNSC had powers under Chapter VII of the UN Charter to establish the tribunal to prosecute crimes that were

³³ See e.g., Mark Kersten, “*The Security Council’s Appalling Record of Referring Situations to the ICC*”, March 23, 2014, Justice in Conflicts blog, available on <https://justiceinconflict.org/2014/05/23/the-security-councils-appalling-record-of-referring-situations-to-the-icc/> (last accessed 21/10/2016).

³⁴ David P Forsythe, ‘The UN Security Council and Response to Atrocities: International Criminal Law and the P-5’, 34/3 *Human Rights Quarterly*, (2012) 840-63.

³⁵ Chapter VII of the Charter of the United Nations, *supra* note 7.

³⁶ *Prosecutor v. Dusko Tadic*, Case No. (IT-94-1), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (October 2, 1995), ICTY Appeals Chamber.

³⁷ Security Council, UN Doc. S/RES/827 (1993) and Security Council, UN Doc. S/RES/955 (1994).

determined to be a threat to international peace and security.³⁸ Despite the fact that at the time, a number of states did not recognize a legal basis under the UN Charter for the creation of the ad-hoc tribunals by the Council, both tribunals for the Former Yugoslavia and Rwanda have since gained acceptance and it is, as such, no longer disputed that the UNSC has this inherent power.³⁹ However, Martti Koskenniemi has questioned the wisdom of allowing the Council to legislate on behalf of the world as early as 1995.⁴⁰ In formulating his thesis about the unsuitability of the UNSC as a forum for making law, he was concerned with a number of problematic features of the institution including the dominance of the P-5 and their ability to wield a veto on any resolution that threatens their respective national interests as well as the lack of legal culture and procedural safeguards when making a decision affecting other members of the United Nations.⁴¹ Like other observers of international law, Koskenniemi conceded the relevance of this system to the maintenance of international peace and security;⁴² a goal that requires swift action and an institutional design that enables the effective formulation of decisions.⁴³ However, he disputed the suitability of the system to the maintenance of conditions of what he termed “the good life”, including the evaluation and enforcement of the rules of international law.⁴⁴

³⁸ *Prosecutor v. Tadic, Supra*, note. 36.

³⁹ Morten Bergsmo “Occasional remarks on certain State concerns about the jurisdictional reach of the ICC, and their possible implications for the relationship between the Court and the Security Council” 69(1) *Nordic Journal of International Law* (2000) 87-113.

⁴⁰ Martti Koskenniemi " The Police in the Temple Order, Justice and the UN: A Dialectical View" 6 *Eur. J. Int'l L.* (1995) 325 - 348.

⁴¹ *Ibid.*

⁴² Koskenniemi *supra* note 40.

⁴³ Devon Whittle, 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action', 26/3 *European Journal of International Law* (2015) 671-98.

⁴⁴ Koskenniemi *supra* note 40, p. 344.

The Council's refusal to refer the situation in Syria to the ICC because of the national interests of some of its permanent members - mainly Russia and the US⁴⁵ may attract the ire of many, and rightly so. However, it is politically unrealistic and indeed naïve to expect states to do anything other than what is in their national interests in the absence of legal and ethical constraints compelling behaviour to the contrary. The international legal system is specifically designed in such a way as to make the maintenance of international peace and security – and by extension the creation of institutions such as the ad-hoc tribunals as well as the trumping of the essential component of state consent in the referral of situations to the ICC - subject to the national security needs of the P-5. Yet, the nature of international criminal justice as well as its implications for the internal political dynamics in post-conflict societies arguably require more than the political deliberation of a handful of states with obvious geopolitical interests.⁴⁶ Therefore, the debate ought to shift from the legality of UNSC referrals to thinking about the legitimacy and long-term effectiveness of selective international criminal law enforcement. The argument that extending the reach of the ICC to states that did not consent to be bound by this regime is a net gain for the international criminal justice regime ignores the question of the need for institutional guarantees capable of ensuring that such referrals are built on adequate normative foundations with nexus to ideals of justice.

In *Tadic*, the ICTY seems to have recognized the inherent power of the UNSC to create the tribunal to adjudicate violations of international humanitarian law in the context of the war in Yugoslavia based on the argument that 'it would be a travesty of

⁴⁵Note Forsyth describing the decision making as follows: "Russia had numerous economic interests in Syria. The US, with one eye on relations with Israel, feared an uncertain power vacuum in a fractured Syria without firm control at the top. For years Assad had not made direct or serious trouble for Israel. China once again followed the other P-5 policies concerning a state where it had few vital interests." *Supra* note 34, p.853,

⁴⁶ Nada Ali "Bringing the guilty to justice: Can the ICC be self-enforcing." 14 *Chi. J. Int'l L.* (2013) 408 - 452.

law and a betrayal of the universal need for justice should the concept of state sovereignty be allowed to be raised successfully against human rights.⁴⁷ One can surely think of two obvious objections to this formulation that pits the pursuit of international criminal justice against state sovereignty and elevates the former over the latter. First, given the limitations under which international criminal justice operates and the required mediation of the nation state to bring about conditions where norms of justice and the rule of law are routinely applied, state sovereignty is more likely to be a necessary condition for the promotion of human rights as opposed to an impediment.⁴⁸ This recognition of the role of the nation state as the first port of call for the protection and promotion of fundamental freedoms is the justification for the complementarity principle, which is the back bone of the Rome Statute. Second, the fact that the UNSC acts in some situations but not in others raises the question whether political expediency has simply replaced state sovereignty as an impediment to the enforcement of human rights in this context.

In addition to the above, it is arguable whether or not referrals of non-states parties pursuant to Art 13(b) of the Rome Statute are in fact comparable to the creation of the two ad-hoc tribunals for the former Yugoslavia and Rwanda. The establishment of the ICTY did in fact come almost last in a series of 19 resolutions concerned with the conflict in the country. The first two of these resolutions were issued pursuant to requests by the Yugoslav government of the time and concerned an arms embargo - that was later criticised for its effect on the struggle of independence in Bosnia-Herzegovina and the prevention of the ensuing genocide - and the deployment of

⁴⁷ *Prosecutor vs. Dusko Tadic supra* note 9, para 58.

⁴⁸ N. Ali, "The Role of Democracy in International Criminal Justice", [on file with author].

peace-keeping troops in Croatia.⁴⁹ Creating the tribunal was eventually divined after a series of failed attempts to induce the parties to the conflict to enforce international humanitarian law standards. Measures adopted by the UNSC in this regard included political and economic sanctions that were aimed at securing a peaceful settlement of the conflict.⁵⁰ The efforts to address the situation, in addition, included a diplomatic conference held in London in 1992 that denotes a measure of deliberative process in dealing with the particular threat to international peace and security.⁵¹

It is also worth noting that in considering the first of the above initiatives, both India and China were of the opinion that it was not the loss of life that was the relevant factor in triggering a Chapter VII initiative, but rather the effect on the peace and security of the region that was relevant.⁵² This is a clear indication of the space allowed to the international community to consider the validity of the establishment of the ICTY as a valid measure for addressing the situation in the Former Yugoslavia. In addition, the ICTY Appeals Chamber considered the approval by the General Assembly (GA) of the establishment and the activities of the tribunal as well as the consent of states with territorial link to the crimes in question in the case as lending force to the legitimacy of the ICTY.⁵³

The trajectory of the involvement of the UNSC in Yugoslavia rather than evince a jealous concern for the protection of individuals and their rights, betrays respect for state sovereignty and a reluctance to create mechanisms for the adjudication of

⁴⁹ Security Council, UN Doc. S/RES/713 and Security Council, UN Doc. S/RES/743.

⁵⁰ Vesselin Popovski "The UN Security Council approach to the conflicts in former Yugoslavia" 2(3) *Southeast European and Black Sea Studies* (2002) 39-62.

⁵¹ *Ibid*

⁵² Popovski *supra* note 50.

⁵³ *Prosecutor vs. Dusko Tadic supra* note 9, para 44 and 56 respectively.

violations of international law except as a last resort. In addition, the question of state consent would not have posed much difficulty to the members of the United Nations not least because the country in question was in a state of disintegration. This was indeed the position of India with respect to the creation of the tribunals as elucidated during the negotiations on the Rome Statute.⁵⁴ It is, therefore, arguable whether this precedent created any form of consensus regarding the acceptability of trumping state consent for the purpose of imposing individual responsibility for violations of international law.

Similarly, and while the creation of the ICTR was much less debated because of the precedent of the ICTY, it was also inherently less controversial because the Rwandan state had itself requested the creation of a judicial body to prosecute the perpetrators of the genocide. Even though Rwanda eventually voted against the resolution, its objection was limited to the absence of the death penalty from the range of sentences open to the tribunal to impose and not on the principle of establishing an international tribunal to prosecute the perpetrators of the Genocide.⁵⁵ In both cases, therefore, the issue of state consent did not present an insurmountable difficulty or a threat worthy of deliberation by other states. By contrast, a referral to the ICC in isolation of wider deliberation signals a new contempt for the sovereignty of the target state; especially if one considers the fact that 3 of the veto-wielding P-5 are themselves not subject to the jurisdiction of the Court and are in fact openly hostile to its activities. In as much as it is relevant to the question of international criminal justice, it appears to be a costless exercise in branding by the Council and not a process dictated by law.

⁵⁴ Devasheesh Bais, "India and the International Criminal Court" 54 FICHL Policy Brief Series (Torkel Opsahl Academic EPublisher) (2016)

⁵⁵ J.E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', 24 *Yale J. Int'l L.*, (1999), 365-613, at p. 476.

The persistent inconsistency in the referral practice of the UNSC makes it very difficult to argue with the AU stance that the major powers seem to still see international criminal justice as a process directed at others.⁵⁶ The issue of state-consent goes to the heart of this debate and is often juxtaposed against the paramount need to protect the fundamental individual rights of victims of atrocities. What is often ignored in stating this dichotomy is that the inconsistent behaviour of the UNSC in providing for or facilitating the adjudication of international crimes creates asymmetries between the rights of victims of atrocities depending on which state was involved in the abrogation of such rights. Should state-consent not be sacrificed on the altar of criminal justice for the victims of atrocities? The answer is perhaps “maybe”. Yet, it is not state-consent in general that is currently sacrificed for the purpose of holding those most responsible for the commission of crimes accountable. Rather, it is the consent of a few states that have no sway over the decisions of the UNSC that gets traded-in for a wider reach of international criminal institutions. The next section delineates the particular asymmetries created by the referral mechanism in Art 13(b) of the Rome Statute. The main argument in the following subsection is that while the said referral mechanism enables the Council to widen the reach of the ICC to states that have not acceded to the Rome Statute; it at the same time provides the permanent members of the Security Council and their allies who have not themselves ratified the Rome Statute with a *carte blanche* to protect themselves from prosecutions by the Court.

⁵⁶ David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2013). p. 66.

In Defence of Individual Rights

The purpose of the UN is stated in Article 1 of the UN Charter to be ‘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 that might lead to breach of the peace.’⁵⁷ This formulation was interpreted by Kelsen as constituting a function of the organization to be carried out by the General Assembly (GA), the Security Council and the International Court of Justice (ICJ); which are all principal organs of the United Nations.⁵⁸ It is further maintained by Kelsen that the reference to ‘conformity with the principles of justice and international law’ in the paragraph is linked with the adjustment or settlement of international disputes, but not to ending ‘situations that might lead to breach of the peace’ which is understood to require a kind of collective action unfettered by considerations of justice.⁵⁹ The United Kingdom delegate to the meeting for discussion of the preamble and Article 1 of the UN Charter noted that the role of the UNSC in maintaining peace and preventing war dictated that considerations of justice occur following action by the Security Council.⁶⁰ In a telling example, he likened the UNSC’s role in this regard to that of a policeman who ‘does not stop at the outset of what he does to inquire where exactly lies the precise balance of justice... He stops [the dispute], and then, in order to make adjustment and settlement, justice comes into its own’.⁶¹

⁵⁷ The United Nations Charter *supra* note 7, Article 1.

⁵⁸ Kelsen *supra* note 28, page 15.

⁵⁹ *Ibid.*

⁶⁰ 1st Meeting of Commission I, U.N.C.I.O. Doc. 1,006, 1/6 (quoted in Kelsen *supra* note 28, fn. 3, page 15).

⁶¹ *Ibid.*

The UNSC could almost be forgiven for the arbitrariness of its decisions if it were not for the central role it assumed after the Cold War in the determination of the parameters of international criminal justice. The inconsistency of UNSC referrals of situations to the ICC, in addition to exposing the inherent hypocrisies in the international legal order, undermines *en masse* the important normative values of independence, impartiality and equality before the law. These are all essential ingredients to the sustainability of any judicial mechanism that regards itself as subject to the operation of law. This inconsistency also detracts from claims of universality that are often raised in defence of UNSC interventions in the affairs of states that have not consented to the ICC regime.

If one fails to take note of UNSC past transgressions in the field of delimiting the jurisdiction of international criminal tribunals,⁶² the clearly carved exemptions from the jurisdiction of the ICC in the two situations in Sudan and Libya can neither be overlooked nor explained away. The situation in Sudan involved a civil conflict that broke out in the region of Darfur and that reached its zenith between 2003 and 2004. The UNSC resolution referring the situation to the ICC⁶³ followed a report from the UN Commission of Inquiry that established how the parties to the conflict, especially the Government of Sudan, committed a number of gross violations of IHL.⁶⁴ However, the indictment of the Sudanese president which followed, while emblematic of other issues of concern in the field of international criminal justice, has little to do with the influence of the UNSC over judicial processes at the ICC. As discussed above, UNSC Resolution 1593 brought Sudan within the jurisdiction of the Court

⁶² Almqvist, Jessica. "A Human Rights Appraisal of the Limits to Judicial Independence for International Criminal Justice" 28(1) *Leiden Journal of International Law* (2015) 91-112.

⁶³ Security Council, UN Doc. S/RES/1593 (2005).

⁶⁴ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (Pursuant to UNSC Resolution 1564), 18th September 2004.

pursuant to Article 13(b); despite the absence of state consent. While effectively overriding the requirement of state consent in the case of Sudan, UNSC Resolution 1593 at the same time created an exemption from the reach of the Court for ‘...nationals... from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court’ and stated that these individuals ‘shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.’⁶⁵ A similar paragraph was also later included in the UNSC resolution referring the situation in Libya.⁶⁶

The difficulty with UNSC initiatives to establish or widen the jurisdiction of these international criminal tribunals is the control it ends up exercising over the type of crimes that such tribunals investigate and prosecute. The exemptions carved in resolutions 1593 and 1970 mirror previous resolutions that also sought to exclude actors who are or whose missions the P-5 support.⁶⁷ It is arguable whether the brief episode during which the ICTY considered the prosecution of NATO commanders for the bombing of Kosovo in 1999 proved to be too close for comfort by the P-5, but a number of subsequent UNSC resolutions restricted the permissible targets of international criminal prosecutions to local actors.⁶⁸ For example the statute of the Special Court for Sierra Leone (SCSL) expressly excluded peacekeepers and foreign personnel from the remit of the Court that was set up to prosecute violations of international humanitarian law in the country during the civil conflict that took place

⁶⁵ UNSC Resolution 1593 *supra* note 63, para. 6.

⁶⁶ Security Council, UN Doc. S/RES/1970 (2011).

⁶⁷ Almqvist *supra* note 62.

⁶⁸ *Ibid.*

between 1991-2002.⁶⁹ And in fact, paragraph 6 of the Sudan and Libya resolutions was itself copied from UNSC Resolution 1497 on Liberia and which was issued in 2003.⁷⁰

The UNSC had also issued Resolution 1422 in 2002 arguably exercising its powers under Article 16 of the Rome Statute to defer situations that are before the Council and requesting the ICC not to prosecute peacekeepers.⁷¹ The preamble to the Resolution states ‘Noting that not all states are parties to the Rome Statute. Noting that States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity.’ However, this jealous guarding of state sovereignty did not extend to pariah states such as Sudan and Libya. The fact that there are documented accounts of mass atrocities, crimes against humanity and/or war crimes in these states does not detract from the argument that the UNSC is engaged in selective international criminal law enforcement that creates a hierarchy of sovereignties as opposed to vigorously defending fundamental rights and freedoms.

The circumstances under which Resolution 1422 was passed is evidence both of US hegemony and its contempt for the values expressed through the operation of international criminal justice institutions.⁷² Using the threat of withdrawing its peace-keeping troops from the former Yugoslavia if the Resolution is not passed, the US had practically coerced members of the UNSC into approving it.⁷³ Deen-Racsmany reports that the Canadian Ambassador Paul Heinbecker accused the Council of

⁶⁹ Almqvist *supra* note 62.

⁷⁰ Security Council, UN Doc. S/RES/1497 (2003).

⁷¹ Security Council, UN Doc. S/RES/1422 (2002).

⁷² Deen-Racsmany *supra* note 11.

⁷³ *Ibid.*

‘creating a class of people not bound by law’ by passing the Resolution.⁷⁴ This incessant restriction of the jurisdiction of these tribunals is a direct result of US objection to the prosecution of its own nationals under international criminal law whether by international tribunals or through the operation of universal jurisdiction.⁷⁵ Commenting on the US manoeuvring over the Lockerbie case and pointing out the multiple casualties of US foreign policy initiatives vis-a-vis its position on the UN Security Council, Mcginley notes that one of them ‘must be the International Court [of Justice] and through it, international law itself.’⁷⁶ Given the ongoing interaction between the UNSC and the ICC, the latter would be the newest addition to Mcginley’s list.

The referral and deferral mechanisms in Articles 13(b) and (16) of the Rome Statute were seen as a reasonable compromise by the drafters of the Rome Statute who wanted a wider reach for the Court but without compromising its independence from the politics of the UNSC.⁷⁷ India, however, had noted during the negotiations how the inclusion of Article 13(b) was indicative of an intention on part of the P-5 not to join the Court while at the same time expecting to be accorded the power of referring other countries to it.⁷⁸ The tendency of the UNSC to exempt certain actors from the jurisdiction of these tribunals makes it harder to characterise the process as being subject to the operation of law or indeed to insist that it is concerned with the protection and promotion of individual rights. It is also obvious that the ability of the P-5 to fend off investigations into violations by their citizens or on their territories or those of their allies, makes the whole referral system under Article 13(b) contrary to

⁷⁴ Deen-Racsmay *supra* note 11, p.355.

⁷⁵ Almqvist *supra* note 62.

⁷⁶ Mcginley *supra* note 24, page 600

⁷⁷ Bergsmo *supra* note 39.

⁷⁸ See Bais *supra* note 54.

ideals of the rule of law and as such inherently suspect.⁷⁹ While overriding state consent to bring non-member states before the ICC, the UNSC habitually shields, and will continue to shield, some states and individuals from the jurisdiction of the Court even if they committed comparable crimes. This, by definition, renders grave violations of international humanitarian law unequal depending on whether or not the UNSC is willing to breach the sovereignty of the state in question or not.

The fact that the ICC cannot divest itself of the situation in Syria is telling. Syria has not joined the ICC; as such the situation on its territory can only be referred to the Court through the UNSC. The referral never took place arguably because of the well-publicised position of Russia vis-à-vis the conflict and its support of the Government of Syria.⁸⁰ This, rather than indicate greater respect for individual rights proves the irrelevance of victims' rights to the current regime of international criminal justice. While Article 13(b) enables the Court to have a wider reach beyond the traditional confines of state consent and may as such be a commendable achievement, what it in fact does is create a world of first and second class crimes and a hierarchy of sovereignties that may or may not be breached depending on geo-political considerations.⁸¹ This is because whether or not atrocities get to be investigated by the ICC, given this regime, relates very little to the nature of the conduct in question and is rather determined by the relative political weight of the state involved.

⁷⁹ Almqvist *supra* note 62.

⁸⁰ *Ibid.*

⁸¹ Rosa Aloisi, 'A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court' 13(1) *International Criminal Law Review* (2013) 147-68. at 160.

It is hardly surprising that the UNSC conducts its business with reference to geo-political considerations; it was set-up to function in this way.⁸² What is problematic, however, is allowing a political body that is hardly constrained by law to determine the parameters of international criminal justice in similar fashion. The preceding discussion indicates that what is often in issue for the Council when referring certain situations to the ICC is not the prosecution of international crimes at large, but the prosecution of international crimes only if they are committed by citizens (officials or otherwise) of less influential states. While this may be business as usual for the UNSC, it is not and should not be the way that the ICC avails itself of cases.

2. Beyond norms: the Damaging Effect of UNSC referrals on the Court

There are multiple reasons why the arbitrariness of the UNSC referrals to the ICC should be of grave concern to policy makers and practitioners in the field of international criminal justice. To begin with, the geo-political influence exerted by the UNSC over the Court through the operation of Article 13(b) is contrary to the intentions of the parties to the Rome Statute. David Bosco explains the revolutionary nature of the ICC as stemming from the outright rejection of the centrality of the P-5 states to the construction of a vision for international criminal justice.⁸³ The creation of the Court outside the UN framework also evinces the intention to create an independent and impartial institution that is free from the trappings of geo-political power. He also notes how the system differs markedly from the UN system with its deference to political weight and that of the International Court of Justice, which is

⁸² Koskenniemi *supra* note 40.

⁸³ Bosco *supra* note 56.

strictly subject to the consent of states to the jurisdiction of the Court.⁸⁴ Yet, and contrary to the original vision for the ICC, allowing the UNSC to refer cases to the Court without reference to strictly defined legal criteria is tantamount to reaffirming the status quo of the current international legal order.

In addition to the above, Almqvist points out the challenges to the ideals of justice and the rule of law posed by UNSC influence over international criminal justice processes.⁸⁵ She notes the tendency both in scholarship and indeed within the judiciary itself to accept the lack of independence of international tribunals as a necessary condition for their existence.⁸⁶ This approach betrays a general recognition of the coercive nature of the international legal system. Almqvist argues, however, that the delimitation of the mandate of international criminal tribunals is of particular concern because it flouts the most basic guarantees of due process rights and equality before the law.⁸⁷

Allowing the UNSC to have such unfettered discretion also reflects an actual absence of an effective rule of law system whenever it leads to situations where like cases are not treated alike. In a domestic setting, Resolution 1593 would be deemed unconstitutional because it seeks to apply the law to some perpetrators but not others. Such selective enforcement will also have the absurd result of upholding some victim rights while denying other equally worthy victims any recourse to remedies. What this means is that raising the issue of the UNSC inconsistent behaviour vis-à-vis the commission of crimes within the jurisdiction of the Court is important not just from a

⁸⁴ *Ibid.*

⁸⁵ Almqvist *supra* note 62.

⁸⁶ *Ibid.*

⁸⁷ Almqvist *supra* note 62.

traditional state-centric view of international law, but also from the perspective of individual rights.

Furthermore, to accept the shortcomings of the current system is tantamount to substituting the tyranny of domestic governments with the tyranny of international institutions. The quest for justice whenever and however one finds it in such a system undermines the very foundations from which the same claims for justice have emerged - namely, the inviolability of fundamental rights and the primacy of law. The principle of equality before the law inspired the drafters of the Rome Statute to include Article 27 that denies immunity to heads of states and government officials. However, the way UNSC referrals have operated clearly vacates this normative stance from any meaningful substance. It is, therefore, also not surprising that a number of African states refused to cooperate with the Court over its outstanding warrant against Al-Bashir.

As mentioned above, PTC II seems to have understood UNSC Resolution 1593 as creating obligations on Sudan tantamount to the obligations owed by parties to the Rome Statute including the acquiescence to removal of diplomatic immunities of officials.⁸⁸ This decision extends the reach of the UNSC unreasonably by allowing it to bind states to treaties they have not agreed to; throwing into question the integrity of the very foundation of international law. While a state that is not a member to the Rome Statute may find itself legitimately under the scrutiny of the court because of the operation of the territoriality principle under public international law (i.e. because one of its nationals committed crimes on the territory of a member state), this is an

⁸⁸ Decision on the Cooperation of the Democratic Republic of the Congo *supra* note 18.

established principle in international law and not an ad-hoc creation. The point is far from being moot given the ICC's recent decision in *Prosecutor v Ntaganda*,⁸⁹ in which the Court created a new category of war crimes applicable to abuses of an armed group's own forces with respect to rape and sexual slavery. The decision was based on the fact that the remit of the Rome Statute as codified can and does go beyond categories of crimes existing under traditional or customary international humanitarian law. However, such change in the law ought to bind only states that have expressly accepted it and not countries like Sudan that are being assigned the position of state parties of the Rome Statute by virtue of the operation of a political body.

While the rhetoric of the Court exhorts the values of respect for the rule of law and individual rights, its relationship with the UNSC taints the institution with suspicions of tyranny and bias. In what follows I outline the effect of this relationship on state cooperation and invoke a different kind of justification for addressing the issue of the inconsistency of UNSC referrals under Article 13(b) of the Rome Statute.

Legitimacy, State-Cooperation and the Uncertain Future of the ICC

The Office of the Prosecutor of the ICC rightly identified perceptions of independence and impartiality of the Court as amongst the highest risks likely to adversely affect the achievement of its policy goals in 2016-2018.⁹⁰ This may or may not have been as a result of understanding the challenges facing the Court -especially with respect to managing its cases in Africa - as stemming from a deep-seated suspicion held by some African states that its brand of justice is neither fair nor

⁸⁹ *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06 OA5, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" (June 17, 2017),

⁹⁰ The International Criminal Court, The Office of the Prosecutor, "Strategic Plan 2016-2018), July 6th, 2015.

unbiased. The persistent inability of the ICC to secure state cooperation to bring to justice the current president of Sudan (Al-Bashir) eventually led the ICC Prosecutor to shelve the Darfur file to direct the resources of the ICC to more promising efforts.⁹¹ The latest episode in this saga was the failure of the South African government to arrest Al Bashir who attended an AU summit in Johannesburg in 2015 and was allowed to leave the country while an emergency order was being obtained from the High Court of South Africa for his arrest.⁹² The ICC also seems to have learned the hard way that the issue of state cooperation is likely to hamper its efforts even at the investigation and litigation stages as was readily demonstrated by the eventual and total collapse of the case against the Kenyan President Uhuru Kenyatta and his deputy William Ruto.⁹³ Both the situations in Sudan and Kenya were subject to intense wrangling between the AU, the UNSC and the ICC.⁹⁴

Prior to the South African episode, the ICC had reported a number of African countries for failure to cooperate with the Court in arresting Al Bashir,⁹⁵ but there was little consequence to this failure even when the states in question were parties to the Rome Statute. In the case of Al-Bashir, he had managed to garner support against his indictment by designating the ICC as a new neo-colonial instrument.⁹⁶ And even though the Kenyan state started off by appearing to cooperate with the Court over its investigations of post-election violence of 2007-2008, the administration eventually

⁹¹ Twenty First Report of the Prosecutor of the International Criminal Court to the Security Council pursuant to the UNSCR 1593, 29 June 2015.

⁹² Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others, Case Number: 27740/2015, 23 June 2015.

⁹³ *Prosecutor v. Uhuru Kenyatta*, (Case No. ICC-01/09-02111), Decision on Withdrawal of Charges, 13 March 2015 and *Prosecutor v. Ruto and Sang* (Case No. ICC-01/09-01/11), Decision of Defence Application for Judgements of Acquittal, 5 April 2016.

⁹⁴ Tessema and Vesper- Grasko *supra* note 39.

⁹⁵ Press Release, ICC, Pre-trial Chamber I informs the United Nations Security Council and the Assembly of State Parties about Chad's Non-cooperation in the Arrest and Surrender of Omar Al Bashir, ICC-CPI-20111213-PR756, (Dec. 13, 2011).

⁹⁶ Forsyth *supra* note 34.

used all the tools it had to hamper the investigation of the crimes for which high profile officials were indicted.

The failure of the ICC to secure state cooperation in its African cases can perhaps be understood given the apparent selectivity and double-standards employed by the ICC in its almost exclusive attention to problems in the continent. Both referrals by the UNSC have concerned African states and attempts by the AU to petition the UNSC to defer investigation into the Sudan situation pursuant to Article 16 of the Rome Statute were unsuccessful. In July 2009, the organization called on all its members not to cooperate with the court because the request in question was not acceded to.⁹⁷ Jalloh predicted at the time that the dismissal of AU concerns in the context was likely to result in substantial legitimacy costs that would hamper the Court's efforts in the continent; which came to be.⁹⁸

There are wide-reaching practical implications of the relationship between the ICC and the UNSC that include the possible withdrawal of African states from the Rome Statute as well as the continued non-cooperation of these states with respect to enforcing arrest warrants. While the Court already feels the effect of state non-cooperation, the consequence of the withdrawal of more than twenty five per cent of its States Parties is likely to lead to the total collapse of the ICC regime. Reports of the intended withdrawal of South Africa from the ICC were rife following Al-Bashir

⁹⁷ African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec. 245(XIII) 2 (July 3, 2009).

⁹⁸ C.C. Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction' (21) Springer (Netherlands) (2010) 1-65.

visit to the country in late 2015.⁹⁹ And after Burundi's Parliamentary vote in October of 2016 to leave the Court, it is no longer reasonable to ignore the concerns of the African Block. What the Court should be aiming for is to expand its membership and as such it should use all the tools available to it to combat perception of its illegitimacy given its co-dependence on the UNSC. It is of course arguable that the withdrawal of some of these states can be explained away as isolated cases aimed at fending off ICC scrutiny of sitting heads of states known to have committed atrocities. However, addressing legitimate concerns regarding the independence of the Court given its relationship with the UNSC may enable populations in these countries to demand greater cooperation with the ICC; both on domestic issues and on issues of surrendering indictees from neighbouring countries.

Legal scholars agree that the legitimacy and credibility of the ICC as well as the aims of international criminal justice in general can only be sustained through a steady flow of successful arrests and prosecutions.¹⁰⁰ As suggested by Fyfe and Sheptyck, '...the question of legitimacy is not unconnected to the practical issue of effectiveness'.¹⁰¹ Inconsistent referrals by the UNSC to the ICC undermine the legitimacy of the Court both in terms of the normative values on which the Court was founded and in terms of the perception held by members of the International Community regarding the nature of this institution and its relationship to power. This perception of lack of legitimacy creates a further challenge for the Court because of its evident effect on state

⁹⁹ The Guardian online, "South Africa to quit International Criminal Court", 20 October 2016, available on <https://www.theguardian.com/world/2016/oct/21/south-africa-to-quit-international-criminal-court-document-shows>.

¹⁰⁰ P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', *The American Journal of International Law* 95(1) (2001) 7-31 and M.C. Bassiouni, 'The Icc—Quo Vadis?', 4(3) *Journal of International Criminal Justice* (2006) 421-27.

¹⁰¹ Nicholas Fyfe and James Sheptycki, 'International Trends in the Facilitation of Witness Co-Operation in Organized Crime Cases' 3(3) *European journal of criminology* (2006) 319-55. at 345.

cooperation. And while it is the general consensus that state cooperation is a perilous foundation for the effectiveness of the international justice project,¹⁰² the point is likely to become even more poignant if arrest warrants concern states that are not themselves party to the Rome Statute.

Aloisi posits that it is a paradox of international criminal justice that while the UNSC is able to extend the jurisdiction of the Court to non-member states, its relationship with the ICC is likely to undermine the legitimacy of the Court and its independence from political will.¹⁰³ However, framing the issue as a paradox necessarily assumes that prosecutions by the ICC are the only possible response to international crimes. A better view is that the Court needs to delink itself from UNSC decisions in order to (i) ensure its own survival; and (ii) affect a change in behaviour in the UNSC. The ICC is not itself bound by the UN Charter, and the argument made in this article is that its institutional rules allow it to distance itself from UNSC decisions.

The now Prosecutor of the ICC informed the UNSC in December 2014 that she was no longer pursuing the Sudan file.¹⁰⁴ While the same may have been claimed as a small victory by the Sudanese president who remains at large after 8 years after the ICC issued the latest arrest warrant naming him, the move signals an understanding by the Prosecutor that the Court has to be an active participant in managing its relationship with the Council. It is also clear that the Prosecutor understands her action to be necessary if the Council is to be made responsible for supporting its referrals by actions that make the prosecution of crimes under the jurisdiction of the

¹⁰² *Ibid.*

¹⁰³ Aloisi *supra* note 81.

¹⁰⁴ Report of the ICC Prosecutor to the UN Security Council *supra* note 60.

Court possible. At the moment, when referring situations of conflict to the ICC, the UNSC boosts its own legitimacy by seeming to be doing something while burdening the ICC with all the coinciding costs including one of legitimacy; the non-cooperation of the target state and other states notwithstanding. The next section builds on this idea to argue for the ICC Prosecutor using her powers under the Rome Statute to decline referrals by the UNSC of situations beyond the ordinary jurisdictional reach of the ICC.

4 Reclaiming the Spirit of the Rome Statute

Whittle argues that the powers of the UNSC could be understood as extra-legal measures used in emergency situations to allow for further ratification in which ethical considerations of political and popular responsibility can feature.¹⁰⁵ Even though this means that action that is taken outside of the law would determine the outcome of processes in international law, the same is designed to protect the very values that the law hopes to uphold and achieve.¹⁰⁶ Alternative suggestions that espouse a more active notion of UN reform include relegating legal matters to the General Assembly¹⁰⁷ and a supervisory role for the UN Secretary-General over decisions of the UNSC.¹⁰⁸ Almqvist understands there to also be an equally important role for dissent in academia or the voluntary sector.¹⁰⁹ And according to Alvarez, the only possible check on the exercise by the UNSC of its power under the Charter is disobedience, which when based on grounds of legitimacy and justice would be an

¹⁰⁵ Whittle *supra* note 43.

¹⁰⁶ *Ibid.*

¹⁰⁷ Koskenniemi *supra* note 40.

¹⁰⁸ Almqvist *supra* note 62.

¹⁰⁹ *Ibid.*

effective delegitimizing tool.¹¹⁰ However, a common ground amongst all these propositions is the idea that the discretion of the UNSC should not be seen as unfettered and should indeed be subject to affirmation by other actors including policy makers.

If one understands UNSC referrals as measures that are subject to endorsement, they cannot remain costless and will indeed be more in the spirit of a constitutional legal order worthy of the rule of law. In this case, a decision by the ICC Prosecutor to decline to look into a situation referred to her by the UNSC may compel the Council to modify its behaviour whether by following a more consistent approach to referring conflict situations to the Court or otherwise. However, this leaves two questions unanswered: (i) can the ICC Prosecutor in fact decline a referral by the UNSC; and (ii) should the ICC Prosecutor decline such referral from an ethical standpoint?

The starting point of the analysis of the inherent powers of the ICC to decline UNSC referrals must be Article 13(b) itself. By stipulating that the Court ‘*may exercise its jurisdiction*’ if the Council refers a situation to it, the effect of the text of the article is to confer discretion on the ICC in this regard. In its Policy Paper on Preliminary Examinations, the OTP sets a stark comparison between the discretionary powers of the Court and its ability to decide against investigations on the one hand and the inability of the previous ad-hoc tribunals to define their own jurisdictional limits.¹¹¹ The policy paper also makes it clear that there should not be a presumption that a referral would automatically result in an investigation.¹¹² And while the OTP made

¹¹⁰ Alvarez supra note 22.

¹¹¹ The International Criminal Court, The Office of the Prosecutor, “Policy Paper on Preliminary Examinations”, November, 2013.

¹¹² *Ibid.* para. 76.

the irrelevance of geo-political balances to a determination by it to investigate,¹¹³ this misses the crucial point that by the time a situation is referred to it by the UNSC, geo-political considerations would have already come into play. As such, and in the interests of fairness, the decision to proceed with investigations should in the very least include an assessment of how the referral was possible by reference to geo-political considerations. In the event it becomes clear that a similar situation happening in a different state would not have otherwise resulted in a referral because of the close ties between the state in question and the P-5,¹¹⁴ the referral should be declined on grounds of fairness and for the sake of ensuring equality before the law.

Exercising prosecutorial discretion in the above manner is likely to raise the cost of referrals by the Council and may thus spur a more serious consideration of which situations to refer and why. In the worst-case scenario, the Council may then decide not to refer any situation in non-member states to the Court. This may be viewed as an unreasonable risk as it will result in constricting the jurisdiction of the Court even further. However, if it will bestow the semblance of equality before the law for all non-member states, it may encourage African states that the ICC regime is neither unfair nor a new tool of neo-colonialism. The argument espoused in this paper is that while it is damaging for the reach of the Court for the Prosecutor to decline to accept referrals from the UNSC in the short-term, continuing to accept such referrals in light of the inconsistent practice of the UNSC may result in greater damage if it leads to the withdrawal of some African states.

¹¹³ OTP Policy Paper on Preliminary Examinations *supra* note 79, para. 29

¹¹⁴ This formulation covers situations that could actually be referred by state members of the Rome Statute and confines the restriction only to situations where state consent is abrogated by actions of the UNSC.

Despite the inherent discretionary powers of the Court vis-à-vis UNSC referrals, Article 53 (1) of the Rome Statute places on the Prosecutor a positive duty to initiate investigations whenever there are reasonable grounds for proceeding with one. However, the Prosecutor is also granted the power to decline to investigate if the same ‘would not serve the interests of justice’.¹¹⁵ Furthermore, Article 53 (2) (c) expressly refers to the possibility of declining to investigate a situation referred to the Court by the UNSC ‘in the interests of justice’. While this provision was inserted to assuage fears about the possible conflict between the aims of achieving justice through prosecutions and instituting peace through settlement, it may be better interpreted in a wider manner that is capable of preserving the whole edifice of international criminal law. The OTP Policy Paper on the Interests of Justice, refers to the preamble of the statute and to the intention ‘to guarantee lasting respect for and the enforcement of international justice’ as relevant to a determination of the meaning of the ‘interests of justice’.¹¹⁶ The understanding in the OTP paper, however, is one that pits deterrence against the peaceful settlement of disputes.¹¹⁷ The argument espoused herein, by contrast, is that the threat to international criminal justice is not posed by political considerations as the usual suspect, but rather by the absence of any such considerations, which invariably results in unfair and unequal application of the law.

Article 53(1) (c) expressly refers to the interests of the victims as a factor to be considered in a determination of the applicability of the ‘interests of justice’ exemption. While the OTP understands the same as strictly referring to the right of

¹¹⁵ Rome Statute *supra* note 6, Article 53(1)(c).

¹¹⁶ The International Criminal Court, The Office of the Prosecutor, Policy Paper on Interests of justice, September 2007.

¹¹⁷ *See e.g.* invoking the situation in Uganda and the attempts by various parties to reach a peaceful settlement of the dispute.

the victims to justice and to seeing justice done,¹¹⁸ this conception embodies a very narrow conceptualization of the concept of victimhood.¹¹⁹ It also presupposes that the category has already been defined by the time the decision not to proceed with an investigation is made. In fact, a consideration of the interests of victims of atrocities (as a wider class that embodies all such victims and not just the victims of the particular situation being referred to the Court) should compel the Prosecutor to decline a situation referred to it by the UNSC. The acceptance of such referrals given the arbitrary nature of UNCS action will exclude some victims from international criminal justice processes without sufficient bases in law. On the other hand, declining to accept such referrals in the short-term may result in a sustainable change of behaviour by the Council.

There are two likely outcomes of a change in policy by the OTP along the lines delineated above; either no individual from non-member states will be referred to the ICC; or all individuals from non-member states will be sent to the Court. While the first of these outcomes seem not to be in line with the interests of the victims in the particular situation, this only follows from an understanding of prosecutions by the ICC as the only possible means to hold those responsible for the commission of atrocities accountable under international law. If the ICC declines to investigate some situations in protest against the arbitrary nature of referrals, the UNSC may itself then set-up ad-hoc tribunals for the purpose provided it is sufficiently invested.

¹¹⁸ OTP Policy Paper on the Interests of Justice *supra* note 84, para. 5 (b).

¹¹⁹ Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' 24 *University of Cambridge Faculty of Law Research Paper* (2013) 235-262.

As has already been discussed, the inconsistent practice of referrals by the Council is likely to result in mass withdrawals from the Court, which will further cripple the institution. Given the UNSC's stake in ensuring the prosecution of international crimes either through the ICC or by establishing ad-hoc tribunals, a decision by the ICC Prosecutor to decline to prosecute UNSC referrals is not likely to result in blanket immunity for perpetrators of crimes under the jurisdiction of the Court. If the UNSC is committed to the cause of international criminal justice, it can choose to establish ad-hoc tribunals for situations that are not accepted by the Court, or indeed adopt a more consistent and responsible approach to referrals of states that are not members of the Rome Statute. Either outcome is a gain for the ICC in terms of both legitimacy and effectiveness. Managing the relationship with the Council in a manner that ensures equal treatment of all states is likely to provide political actors within reluctant states parties with the required justification to continue to cooperate with the Court despite political criticisms of the current world order. It might also encourage countries with a known pro-democracy and pro-rule of law tradition; like India, to join.

Conclusion

It has become increasingly obvious that the relationship between the International Criminal Court (ICC) and the United Nations Security Council (UNSC) will be one of the determining factors in the perceived legitimacy of the Court. The inconsistent practices of UNSC referrals of non-member states to the ICC are likely to result in serious legitimacy costs for the Court. There is evidence, in addition, that the UNSC influence on international criminal justice processes can have a negative effect on the

Court's ability to prosecute atrocity crimes. While reforming the UN System is outside the scope of influence of the Court, the ICC Prosecutor may have sufficient tools within her power to manage the relationship with the UNSC effectively.

The suggestion in this paper is that the ICC Prosecutor should decline to prosecute cases referred to the Court pursuant to Article 13(b) and which involve non-member states such as Sudan. The danger in continuing to accept referrals from the Council is that it may result in alienating a host of less influential states that already view the international world order with a great deal of suspicion. Even though declining to prosecute such cases appears to be in direct conflict with the mandate of the Court especially given the current shift in international criminal law from regulating the relationship between states to protecting individual rights, seeking to alter the behaviour of the UNSC may in fact result in a better system of enforcement and increased legitimacy for the ICC.

In an international society of states that continues to be subject to the vagaries of power, an insistence on the importance of individual rights is likely to result in grave injustices not least to the victims of atrocities. Until such time as we evolve into a world community guided by common values and a belief in the sanctity of the fundamental freedoms, the ICC should decline to accept referrals from the UNSC to distance itself from the taint of being subject to the political will of the most powerful states.

