A Synergistic Failure between the UN Security Council and the International Criminal Court

Dharmendra Chatur
A SYNERGISTIC FAILURE BETWEEN THE UNITED NATIONS SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT

DHARMENDRA CHATUR (08D6015)

VII SEMESTER B.A., LL.B. (HONS.)

INTRODUCTION:

The ICC is the first ever permanent, treaty based, international criminal court. The purpose of the ICC is to promote the rule of law and ensure that the gravest international crimes do not go unpunished, whether the crimes were committed by the vanquished or the victorious.¹ The ICC legally came into existence on 1 July 2002. The court became operational when the signatory nations met in the Assembly of State Parties to appoint a prosecutor and 18 judges. It opened on March 11, 2003.

Cases can be referred to the ICC by one of four methods:

1. A country member of the Assembly of States Parties (ratified the Court's Statute) sends the case;
2. A country that has chosen to accept the ICC’s jurisdiction sends the case;
3. The Security Council sends the case (subject to veto from the permanent five members); or
4. The three-judge panel authorizes a case initiated by the ICC Prosecutor.

¹ Speech titled 'The International Criminal Court—Its Role, Tasks and Performance' by Justice Y. K. Sabharwal, Chief Justice of India.
It is with respect to the third category of cases where we need to examine how the relationship between the United Nations Security Council (“UNSC”) and the International Criminal Court (“ICC”) has panned out ever since the ICC was established. This paper is divided into three parts – Part I deals with the provisions relating to the relationship between the UNSC and the ICC as has been envisaged in the Rome Statute of the ICC; Part II deals with the practical situations when the relationship has been tested or powers have been exercised by the UNSC in respect of international peace and security vis-a-vis the ICC; Part III examines the successes or failures of the relationship between the two international bodies and will explore the possibility of whether the synergy between the bodies can be enhanced and made more effective.

I. UN Security Council and the Rome Statute of the International Criminal Court

Article 2 of the ICC Statute provides that “the Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf”. This deals only with certain aspects of the overall relationship between the Court and the UN. The Relationship Agreement between the Court and the UN in fact includes “two types of provisions: on the one hand, standard provisions on institutional relations, similar to those found in other relationship agreements between the UN and other international organizations...; on the other hand, specific provisions deriving from the Statute and reflecting the functional relationship between the UN and the ICC on substantive matters”.

\(^2\) Antonio Marchesi, Article 2, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – Observers’ Notes, Article by Article –, 63 (Otto Triffterer ed., 2008).

There was much deliberation as to what the exact relationship between the ICC and the United Nations should be during its formative stages. Many suggested that it should be an integral part of the United Nations which meant that the U.N. Charter would have to be amended to make provisions for such an organ, whereas creation of the ICC by a Security Council resolution was objected by pointing that “the Council’s competence under the Charter to create ad-hoc tribunals in response to a particular situation endangering international peace and security should be distinguished from the ... endeavour of creating an international criminal court with general powers and competence”.

Although the final decision was to create an entirely separate institution of the ICC, the structural links with the UNSC and other organs were inevitable, where it was important that such relationship would in no way jeopardize the independence of the Court. Eventually a Negotiated Relationship Agreement between the UN and the ICC entered into force in October 2004. It comprises of the Preamble and 23 Articles. The most relevant Article of this Agreement to our discussion in this paper, dealing with role of the Security Council, is Article 17, related to Articles 13 (b), 16, and 87 (5.b) and (7) of the Rome Statute, each of which will be considered separately below.

Therefore, there is a three-pronged relationship between the ICC and the UNSC:

1. **First**, under Article 13 (b) of the Rome Statute – dealing with referral by the Security Council of an issue affecting international peace and security acting under Chapter VII of the UN Charter to trigger the jurisdiction of the ICC.

---


6 1996 Preparatory Committee 1 of the ICC Statute, p. 9.


8 Supra note 6. The standards of independence of the judicial institutions are encompassed within Article 10 of the Universal Declaration of Human Rights, Article 14 (1) of the ICCPR, the United Nations Basic Principles on the Independence of the Judiciary.


10 Basically deals with the procedures of communication to be followed in each of the above cases.
2. Second, under Article 16\textsuperscript{11} of the Rome Statute – dealing with deferral of investigation or prosecution by the ICC and in effect, empowering the Security Council to prevent or stop an ICC investigation or prosecution for a renewable period of 12 months by means of a resolution adopted under Chapter VII of the UN Charter.\textsuperscript{12}

3. Third, Article 87 (7) provides for the UNSC to act as an enforcement mechanism for the pronouncements of the ICC.

An important distinction needs to be noted between the wordings of Art. 13 (b) and Art. 16 of the Rome Statute. Whereas the former confirms the UNSC’s referral power, it applies the term “acting under Chapter VII of the Charter”, and the latter confirms the deferral power on the basis of “a resolution adopted under Chapter VII”.\textsuperscript{13}

II. UNSC Referrals or Deferrals to the ICC: Practical Situations

1. Conflict in Darfur, Sudan:

The conflict in Sudan involves two main groups: (a) the government of Sudan and the Popular Defense Forces (PDF), a militia called the 'Janjaweed' that the government employs to supplement its forces; and (b) the resistance forces, including the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM).\textsuperscript{14}

\textsuperscript{11} This Article and the power of the Prosecutor of the ICC to \textit{proprio motu} begin investigations has stuck out as a sore thumb for the USA, and therefore it has not ratified the ICC Statute yet. See generally, W. A. Schabas, \textit{United States Hostility to the International Criminal Court: It’s all about the Security Council}, 15 (4) EJIL 701-720 (2004).

\textsuperscript{12} Art. 16 reads “no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

\textsuperscript{13} Bergsmo & Pejic, \textit{Article 16}, in \textit{COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – Observers’ Notes}, Article by Article –, 603 (Otto Triffterer ed., 2008).

In response to attacks by resistance forces in 2003, the Sudanese army, with the help of the Janjaweed, launched a counter-insurgency campaign to wipe out the resistance forces.\(^{15}\) In September 2004, after the death and displacement of hundreds of thousands of people, the UN Security Council mandated a commission to investigate and report on the situation in Sudan.\(^{16}\) The Darfur Commission found that the governmental forces and the Janjaweed, who were financially and militarily supported by the government, had committed several crimes such as rape, looting, and massacres.\(^{17}\) Their actions led to the death of thousands of civilians and to the mass displacement of the population. On March 31, 2005, in response to the Darfur Commission findings, and after some initial hiccups,\(^{18}\) the UN Security Council passed Resolution 1593 referring the Darfur case to the ICC Prosecutor.\(^{19}\) The Security Council’s referral was historic; it was the first time that the Security Council referred a case to the ICC.\(^{20}\)

After analyzing the evidence, the ICC Prosecutor determined that sufficient evidence existed to initiate a full investigation.\(^{21}\) On February 27, 2007, ICC Prosecutor Luis Moreno-Ocampo filed an application for an arrest warrant with the Court against two Sudanese nationals; Ahmed Harun, the Minister of Interior, and Ali Kushayb, the leader of the Janjaweed militia in West Darfur.\(^{22}\) On April 27, 2007, the Pre-Trial Chamber issued warrants for the arrest of both men. Neither of them have, as of yet, been handed over to the Court.

On July 18, 2008, the Prosecutor filed another application for an arrest warrant involving the conflict in the Sudan. On March 3, 2009, the Pre-Trial Chamber issued

\(^{15}\) Id at 1083.

\(^{16}\) Id at 1086.

\(^{17}\) Id.

\(^{18}\) Security Council split on Darfur trials, AlJazeera.net, 18 February 2005.


\(^{21}\) Totten & Tyler, supra note 14 at 1072.

\(^{22}\) Warrant of Arrest for Ali Kushayb, Situation in Darfur, Sudan In the Case of the Prosecutor v. Ahmad Muhammad Harun and Al Muhammad Al Abd-Al-Rahman, Case No. ICC-02/05-01/07 (Apr. 27, 2007); Warrant of Arrest for Ahmad Harun, Situation in Darfur, Sudan In the Case of the Prosecutor v. Ahmad Muhammad Harun and Al Muhammad Al Abd-Al-Rahman, Case No. ICC-02/05-01/07-2 (Apr. 27, 2007).
the arrest warrant for President Al-Bashir, which listed seven counts; five counts of crimes against humanity and two counts of war crimes.\textsuperscript{23} This marked the first time that the ICC had issued an arrest warrant for a sitting head of state.\textsuperscript{24}

China was against such the issue of the arrest warrant against Al-Bashir, calling for suspension of the same as it could interfere with the peaceful situation in Darfur.\textsuperscript{25} Also, Ban ki-Moon, reacting to the arrest warrant expressed concerns of the potential ramifications if the Sudanese president were to be arrested, saying it could complicate the peacekeeping process in Darfur.\textsuperscript{26} Whereas some commentators suggest that “the ICC should not rescind the arrest warrant nor negotiate an amnesty. The Court must stay true to its mandate and prosecute major war criminals or it risks becoming irrelevant. The risk of granting impunity for a major war criminal would undermine the effectiveness and need of the ICC.”\textsuperscript{27}

\section*{2. SITUATION IN LIBYA:}

Recently, following the so-called ‘Arab Spring’ in many Middle East countries such as Tunisia, Egypt etc, civilians in Libyan Arab Jamahiriya started raising similar demands of bringing down the totalitarian Libyan ruler Qaddafi from the position he has held for several decades.

Col. Muammar Qaddafi and the others were accused of orchestrating the killing, injuring, arrest, and imprisonment of hundreds of civilians during the first dozen days

\footnotesize{\textsuperscript{23} Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Situation in Darfur, Sudan In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 (Mar. 4, 2009).  
\textsuperscript{25} China wants Bashir case suspended, AlJazeera.net, 05 March 2009.  
\textsuperscript{26} Mixed reaction to ICC ruling, AlJazeera.net, 17 July 2008.  
of the uprising against Qaddafi. Thousands more have died since. The hostilities have led to humanitarian concerns about the flight of Libyans into Europe and neighbouring countries. Warrants were issued against Qaddafi by the ICC after the situation in Libya was referred by the UNSC to the ICC. This is the second referral by the UNSC after Sudan.

III. A FAILURE OF THE SYNERGY BETWEEN THE ICC AND THE UNSC?

After the referral of the Darfur crisis to the ICC, some commentators suggested that “to allow the selection of cases to be so dependent on issues of collective security, and to be overseen by a political body concerned with it, is at odds with the fundamental goal and unique focus of all criminal courts to adjudicate the culpability of individual suspects.” Allowing such political interference in the functioning of the Court, in the opinion of the commentator, creates two international criminal courts – one for the State parties to the Rome Statute and the other for collective security for non-state parties, in the form of referrals by the Security Council militate against the basic tenets of criminal justice system i.e. prosecution of individual guilt.

Some commentators have argued that the potential effectiveness of the Court is constrained under the current structure of the ICC and in the current political climate, as Security Council referrals to the ICC have no more enforcement behind them than State Party referrals or investigations initiated by the ICC Prosecutor, even though the Security Council theoretically can back up its referrals with Chapter VII authority. This is the case because the Security Council has not chosen to exercise its Chapter VII powers outside of the referral itself. The only way, as is suggested, is if the ICC amends

---

31 Id.
its structure to accommodate the views of the USA to make the investigations and arrest warrants more effectively enforceable through Security Council resolutions.\textsuperscript{33}

Amidst all the concerns about the usage of the power of referral to the ICC by the UNSC, Amnesty International released a report stating that international justice was being undermined by powerful nations.\textsuperscript{34}

With the mandate of the ICTY coming to an end after the arrest of the last perpetrator, observations have been made regarding the effectiveness of international tribunals in being a deterrent to other war criminals. The ICTY was successful only because of its limited mandate and that there was broad consensus that heinous crimes were committed in the Balkans. But the continuing international crimes, like Qaddafi, only display a larger truth that international law, for all its good intentions, is no substitute for international action.\textsuperscript{35}

For the ICC to be more effective, it must place more emphasis on national justice systems where atrocities have been committed.\textsuperscript{36} While other international analysts argue that international criminal tribunals are rife with shortcomings – and should remain only a secondary option, when local forms of delivering justice are impossible.\textsuperscript{37}

The Rome Statute has garnered many party states in the few years of its existence, albeit without the support of many countries such as USA and India. The problems of enforcement mechanisms against non-party states and the use of Security Council

\textsuperscript{33} Id at 670.

\textsuperscript{34} The price of impunity, AlJazeera.net, 27 May 2010. It read that the hypocrisy and double standards of more powerful nations undermine calls for justice that are legitimate, as more and more weaker states are being held accountable for human rights abuses while powerful countries like U.S., China and Russia went scot-free.

\textsuperscript{35} Seldowitz & Rubin, Balkan Justice Hasn’t Deterred Crimes Elsewhere, Bloomberg Businessweek, 21 July 2011.


referrals to further political agenda have been common criticisms especially when the power of referrals has been exercised. It would be too early to pass judgment on whether the ICC has failed as an institution, but the relationship between the UNSC and the ICC needs examination. The pertinent question to be answered is whether invocation of powers under Chapter VII of the UN Charter for maintenance of international peace and security actually achieve the said purpose. In the case of Sudan and Libya, the ICC referrals if not mitigated, only exacerbated the disputes, not necessarily as a result of the referral itself. The point being that referrals only vitiate international principles of binding countries to treaty obligations that they do not wish to undertake in the first instance. To mandate anything to the contrary strikes at the root of the consent-based approach to international law. It is true that certain nations tweak the legal systems to further their political interests over concerns of peace and justice proper. Taking Syria as an example, situations there are similar to that which existed in Libya when the referral to the ICC was made. However, no international action has been taken to help the protesters against governmental oppression and execution, where evidence of crimes against humanity having been committed is glaring.38

Reconciling well-established principles of sovereignty and protection of innocent victims against international crimes vis-à-vis UNSC action to protect international peace and security would be hard to come by – but an effort in that direction is imperative to do away with disparate political action affecting an independent judicial body of that of the International Criminal Court.

---

38 *Syria accused of crimes against humanity*, AlJazeera.net, 06 July 2011.