

The Impact of the Security Councils' Powers on the Jurisdiction of the International Criminal Court

Rozhgar A. Mahmood
Department of Law
University of Raparin

Abstract

After many years of endeavors, on July 1998 the Statute of the International Criminal Court entered into force. A Court which is unlike the International Tribunals such as the ICTY and ICTR is a consent based organ. The establishment of the ICC is a significant step toward achieving international justice and accountability, challenging the impunity to those who commit dangerous crimes. . It was intended to be a judicial body which is independent from the United Nations, in particular from its political body (the Security Council). However, this is with respect to the powers given to the Security Council on the basis of the statute of the Court (article 5(2),13(b),and 16). Some argue, that those authorities given to the Security Council according to the Statute of the Court have gave sort of hegemony to the Security Council over the international Criminal Court. Therefore, in this research we will analyze the impact of those powers of the Security Council on the Court, effective judicial body.

Introduction

After many years of endeavors, on July 1998 the Statute of the International Criminal Court entered into force¹. A Court which is unlike the International Tribunals such as the ICTY and ICTR is a consent based organ². The establishment of the ICC is a significant step toward achieving international justice and accountability, challenging the impunity to those who commit dangerous crimes, such as Genocide, war crimes, crimes against humanity, and aggression. It was intended to be a judicial body which is independent from the United Nations, in particular from its political body (the Security Council)³. However, this is with respect to the power of referral given to the Security Council under article 13 of the statute, its competence of deferral on the basis of article 16, and its role in defining the Crime of aggression under article 5(2) of the Statute⁴. These powers that are given to the Security Council under the Statute caused a significant controversy. Thus this essay will discuss whether they have a positive effect on the Court to achieve its goals of being an effective judicial body, or they have vice-versa results, or as it is said they have surprised the drafters of the Statute when they are applied in practice.⁵

1. Mark Weller, Undoing the global Constitution: UN Security Council action on the International Criminal Court[2002]78*International Affairs*693

2Cryer Robert and others , *An Introduction to International Criminal Law and Procedure*(CUP,2007)

3The preamble of Rome Statute of International Criminal Court,july17,1998,UN.Doc.A/CONF.183/9,37 I.L.M999,1012[hereinafter Rome Statute],para9

4Schabas William A., United States Hostilities to the International Criminal Court; It's All About the Security Council,[2004] 15 *European Journal of International Law*701

5 Mohammed Al Zeidy, The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422[2002] 35 *Vrsnational Journal of Transnational Law*1503

The Big issue (Article 16) 1.

One of the most complicated, debatable, relations between ICC and Security Council is the direct relation on the basis of Article 16 of the Statute, which has been articulated after long negotiations and many proposals. One of the proposals was that: ' No prosecution may be commenced under this Statute from a situation which is being dealt with by the Security Council as a threat to or a breach of aggression under chapter VII of the Charter, unless the Security Council otherwise decides'⁶, this was proposed by the International Law Commission. However because the Court was meant to be "independent international Criminal Court in relation with the United Nations system"⁷, thus this proposal was rejected. The power of the Security Council is not to the extent to be called the ' gatekeeper' of the ICC⁸. Nevertheless, this article caused a significant controversy either by the Security Council members, such as the U.S which views it as an attempt against its powers and restricting Security Councils power in relation with the ICC, and the opponents of the ICC who see it as a danger to the Courts legitimacy as they are afraid of *abusing* it by the Security Councils' members. Although, requiring that the nine members including the five permanent vote was intended to restrict the deferral and make it not to be abused by major powers⁹, however, others supported the existence of such interference and considered it as necessary, saying that in any judicial system there is a need to an organ to enforce law¹⁰. provides that:

' 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'¹¹

Thus, there are certain conditions need to be met. First, the Security Council should ask such a request via a resolution adopted under VII, and the requesting for the renewal should be for no more than 12 renewable months, thirdly there should exist a threat on international peace and security¹². Generally in the case of deferral the Court will not lose its jurisdiction on the deferred case, and the *aim* of the deferral is to preserve International peace and security¹³. The problem that this article causes to

⁶See Article 23(3) of the ILC's draft statute in Report of International Law Commission on the work of its fort-six session, U.N GAOR,49th sess., Sup.No,10,at85, U.N. Doc A/49/10

⁷Abbas Ademola, The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court, [2005] 40 *Texas International Law Journal* 263

⁸W. Schabas, above, n4, p117-118

⁹W.A Schabas, above, n4, 701-716

¹⁰ibid

¹¹Rome Statute of International Criminal Court,july17,1998,UN.Doc.A/CONF.183/9,37

¹²I.L.M999,1012[hereinafter Rome Statute

¹³A.Mokhtar, The fine Art of arm-twisting: The US, Resolution1422 and Security Council deferral power under Rome Statute[2003] 3 *International Criminal LawReview*295

¹³ Ibid,p130

the ICC does not result from the provision if it is interpreted and applied as the drafters intended to be. However, in practice this article is not applied for its purpose, or could be said that it has been *abused*. The Resolution 1422 which was adopted on July 12 2002 by the Security Council requesting the ICC to give immunity to the Peace Keepers who participated in the peace keeping mission in Bosnia Herzegovina is the most example of the *misuse* and *distorting* this article by the Security Council in particular by the United States¹⁴. In first, the US asked for giving immunity only to its soldiers, otherwise, it will veto renewing the peace keeping mission in Bosnia- Herzegovina¹⁵. Although, the US was highly criticized, the resolution was passed providing that the 'current or former officials or personnel from contributing [non- party states] to the Rome Statute' were exempted from the jurisdiction of the ICC on the basis of Article 16 of the Statute¹⁶. Furthermore, 'renew the request.... Under the same conditions each year the same 1 July for further 12 months period' is provided¹⁷. The ambiguities about this resolution is that prior to starting any mission by the Security Council under article 39 there should exist a threat on international peace and security, however, in relation to resolution 1422 it is difficult to find a connection between *paralyzing* the Courts' jurisdiction over U.S soldiers or peace keepers with keeping international peace and Security, or could be said that there is not any relation between the two, therefore, the Resolution that excluded them is inconsistent with article 16, and it could be considered as creating new exception to this article, or as mending the Rome statute which is not within the Security Councils' power¹⁸. Another flaw or aspect of incompatibility of the Resolution with the Statute is that it is renewable to unlimited period, or as it is provided by the Resolution whenever it is necessary, this is despite that according to Article 16 the renewal should be for one year period¹⁹. Thus, it is obvious that Article 16 is not applied and interpreted as the drafters of the meant it to be, because article 16 is not meant to grant a 'blanket exemption' for states, but it is a chance to the Security Council to obtain its aim and obligation of preserving international peace and security on case-by-by-case basis, but, this is not the reason behind invoking article 16 in the Resolution 1422²⁰. In fact, it raised questions about the legitimacy of ICC, and it started a controversy about the possibility of the Court's jurisdiction to be 'eroded' by the Security Councils' actions²¹. Thus, it could be said that the Resolution 1422 as the same undesired effects of the article 23 of the ILC which gave control to SC over the ICC jurisdiction, in other words, it resulted in vise versa of what the drafters of

14M Al- Zeidy,above n5,p1509

15ibid

16S.C,Res.1422,U.N. SCOR, 57th Sess.,4572d mtg.at 1,u.n. Doc, S/RES/1422(2002) [hereinafter S.C. Res.1422]

17Ibid,para2

18Jaine Neha, A Separate Law for Peace Keepers : The Clash Between Security Council and the International Criminal Court[2005] 16 *European Journal of International Law*239

19A.Mokhtar,above,n12

20M. Happold, Darfur, The Security Council, and International Criminal Court [2006]55 *International and Comparative Law Quarterly*226

21N.Jaine, above n18, p329

Article 16 intended to achieve²². Furthermore, this resolution is dangerous, because, beside that it impedes the Rome Conference achievement of independent court, it also puts the principle of equality before the law questionable²³, and it does not only has negative impact on the ICC, but it runs counter to the major principle of International Law²⁴. In addition, it gives a stronger evidence for those who argue that 'under this resolution it seems that politics can override law whenever the situation demands'²⁵. If the Security Council utilizes article 16 as it in the same way did in Resolution 1422 it will be possible that deferral will leads states to ask for more interference by the Security Council in the ICCS' jurisdiction, thus it overrides ICC'S power²⁶. In addition, exempting individuals from ICC'S jurisdiction encourages heads of states and other criminals to ask to be exempted or at least they will delay the prosecution²⁷. In general, article 16 is considered as affirming the supremacy of strong political power of the Security Council in relation to matters of preserving international peace and security²⁸. As a result of all that, it might be true to say that it codifies the right of political body to interfere in the working of a judicial institution and thus undercuts the legitimacy of ICC and independent judiciary²⁹.

Although the ICC is not bound to accept deferral as the article referees to the word 'request', thus the prosecutor can evaluate whether the case will serve justice or not, but in this case there will be a possibility of *conflict* between the Security Council and the ICC³⁰. In addition what makes article 16 to Have more negative impact on the Court is that the result of deferral is not clear, it will not stop the action by the prosecutor, but it will delay it, and there will be more chance for the Criminal to eliminate the evidences and documents against him or her. Consequently, it leads

22Al- Zeidy, above, n5, p 1517-1544

23. C. Stahn, The Ambiguities of Security Council Resolution1422(2002), [2003]14 *European Journal of International Law*85, p104

24M. Al-Zeidy, above, n5

25. L. Moss, The Un Security Council and International Criminal Court, Towards a more principled Relationship, *International Policy Analysis*, March 2012, available on: Library.fes.de/pdf-files/iez/08948

25. L. Moss, The Un Security Council and International Criminal Court, Towards a more principled Relationship, *International Policy Analysis*, March 2012, available on: Library.fes.de/pdf-files/iez/08948

26ibid

27. L. Oette, Crimes in Darfur before the ICC : Five years of Peace and Justice or Niether? The Repercussions of the Al- Bashir case of the International Criminal Justice in Africa and Beyond [2010]8 *Journal of International Criminal Justice*345

28.. H. Mysty and D. R. Verduzco, The UN Security Council and the International Criminal Court, *International Law and Human Rights Programme, Parliamantaries for Global Action*, 16 March 2012, available on: [www.chathamhouse.org/.../Internationa 20 lae/160312 summary.p...l](http://www.chathamhouse.org/.../Internationa%20lae/160312_summary.p...)

. M. Al-Zeidy, above, n5, p15202727

30. C. DE Than and E Shorts, *International Criminal Law and Human Rights*(Sweet and Maxwell,2003), p326

31. ibid

32. Rome Statute, above, n11, Article13(b)

33. H. Mysty and D.R. Veruzco, above, n28

34. ibid,p3

35. ibid

the prosecutor too look weak in the eyes of the international community, and it will affect the dignity of the Court as an independent, legitimate International Court³¹.

2. Article 13(b) of the Rome Statute

On the basis of article 13(b) the Security Council is given the power to refer a case to the ICC acting under chapter VII powers even if the state is not party to the Rome Statute, when the Security Council finds that there is a threat to international peace and security³². Thus, this article, is said to be a mid- solution for the problem or debates about limiting the powers of the Security Council to interfere in the ICCS' jurisdiction as some desired a dependent court which the Security Council have no control over the Court³³. This article is debatable and criticized to be *double standard*, as three of five members of the Security Council that can refer states to the Court are not themselves parties to the ICC, thus, the jurisdiction of the Court is not accepted by themselves, so how can they referee others³⁴. Furthermore, the ICC is based on the Treaty of Rome, thus it is a consent based organ which states that are not party to its treaty cannot be obliged to accept its jurisdiction, therefore article 13(b) will run counter to the basis of the court, and in this way its legitimacy might be undermined³⁵. Thus states especially the nine parties to the Court are claiming that the Court is used as a 'tool' for the political interest of the major powers, as deciding whether there is a threat to international peace and security by a political body is a political decision³⁶. The practice of this power by the Security Council could help more in determining whether the Security Council has affected negatively or positively on the effectiveness of the Court, as an independent, effective judicial body. An example is the Resolution 1523 which was adopted on 31 March 2005, whereby the Security Council decided to 'refer the situation'³⁷ in Darfur to the ICC as the Court was seen as 'the only credible way of bringing alleged perpetrators to justice'³⁸. The most dangerous aspect of the referral by the Security Council on the ICC is when the former referee a situation, but after it does not provide any kind of support to the latter, all what it does is giving some reports on the situation to the prosecutor from time to time, this will to large extent affect the Courts' accountability³⁹. The Court may not be able to arrest a criminal in a non-party state territory. If the SC does not provide co-operation, thus it might be called as ineffective. This is what happened in the case of Darfur referral one of the

31. *ibid*

32. Rome Statute, above, n11, Article 13(b)

33. H. Mysty and D.R. Veruzco, above, n28

34. *ibid*, p331

35. *ibid*

36. *ibid*

37. UN Doc S/Res/1593(31 March 2005) adopted by vote, 11 in favor, non against, 4 abstentions(Algeria, Brazil, China and the USA)

38. Report of International Commission on Darfur pursuant to the Security Council Resolution 1564 of 18 September 2004(Geneva 25 Jan 2005) paras 2-10 in M. Happold, above, n20, p229

39. H. Mysty and D. Ruiz, above, n28, p9

40. *ibid*

perpetrators of the International Crimes (Al- Bashir) has not been arrested , although, the Court has issued an arrest warrant, and the Security Council has been notified several times regarding the arrest warrant by the Court, but, the SC did not respond⁴⁰. This is despite that Al- Bashir has visited the Countries of the members of the Security Council, which leads some to say that Darfur has made the future of the referral more ambiguous⁴¹. Furthermore, silence of the SC on the arrest warrant of the Saif- Al Islam Al Ghaddafi is wondered as the case of Libya was referred by the SC via Resolution 1970 which was adopted on 26 February 2011⁴². Moreover, in applying sanctions on those who were sought by the ICC in the Libya the Security Council did not provide co-operation to the Court, this will again impacts negatively on the Courts reputation., like to repair those people who were victims of the Gaddafis' regime the Court wanted to froze the assets of the Criminals in the Banks, in this regard it needed the Security Council aid but it did not respond⁴³. The cases of referral such as Darfur and Libya proved the negative impact of the power of referral of the Security Council on the ICC as an effective judicial body. The Security Council is not active and not co-operating in arresting Al- Bashir, still states from Africa middle -east parties of the ICC and non- parties, even the Security Council members are not assisting the Court⁴⁴. Thus, it is debatable whether sacrificing justice has lead to preserving peace or not as there are still major Crimes in Sudan committed and the situation cannot be said that have progressed nor it can be said to be deteriorated⁴⁵. Additionally there is fear of accusing the 'enforcement of international law to be biase' by the ICC, as all the referral by the Security Council has been in African States⁴⁶.

3. A connection based on Article 5(2) of the Rome Statute

Another controversial area is the relation between the Security Council and the ICC on the basis of article 5(2) of the Rome Statute, which gives the automatic jurisdiction to the Court on the Crime of Aggression, however the Statute did not defined the Crime⁴⁷. The act is prohibited under the un charter and the charter gave the power of determining it to the SC⁴⁸. Before the Rome Statute was agreed on, and articulating Article 5(2) the international law commission proposed that the Crime of Aggression

41.L.Oette, above n27

42. UN Doc S/RES/1970(26February 2011) adopted by unanimous vote in favor

43. H. Mysty and D. Ruiz, above n28, p9

44. L. Oette, aboven 27

45. M.D. Evans, Evans Malcom D, *International Law*(Oxford University Press,3rd ed, 2010) , p,276

46. L. Oette, 358

47Rome Statute,. above, n11, Article5(2)

48. United Nations, Charter of the United Nations. 24 October 1945

49. Vertibsky. J, What Should be the Relationship between the International Criminal Court and the United Nations Security Council in the Crime of Aggression?[2008]4 *Review of International Law Politics*141

50. The Rome Statute,above, n11, article2

51. The Charter of the United Nations, above,n50,article39

52.M. Stein, The Security Council, The International Criminal Court and the Crime of Aggression[2005]16 *International and Comparative Law Quarterly*1

53. J. Vertibsky, above, n51, p154

should be determined by the Security Council before the ICC exercises its jurisdiction on the Act of Aggression⁴⁹. However, article 5(2) was articulated without giving such power to the Security Council, but according to Article 2 of the Statute the Courts' jurisdiction should be, consistent with the relevant provisions of the Charter of the United Nations⁵⁰, and as Article 39 of the UN Charter gives the power to the Security Council to determine the Crime of Aggression, therefore, some interpreted article 5(2) to require pre-determination of the Crime of Aggression by the Security Council⁵¹. However, as it was mentioned above the Security Council is a political body that the interest of the five permanent members might effect on its decision, besides that there is the danger of the veto⁵². Therefore, this might undermine the 'development of an autonomous definition of the crime of aggression, particularly when a body guided by political rather than legal consideration would make such a determination'⁵³. Furthermore, the Security Council as a danger other than ICC no organs have such a power to limit the role and the power of the Security Council, therefore, it might abuse this power to restrict and 'impede' the Courts jurisdiction and power. Thus, it is not for the ICCS' favor for the Security Council to have power in determining and defining the Crime of Aggression.

Conclusion

To sum up, via creating a permanent international Criminal Court the drafters of its statute believed that the perpetrators of the Genocide, war crimes, crimes against humanity, and aggression will not be left without punishment, the Court will ensure their 'effective prosecution', and via independent judicial body they will be able to obtain a better 'enforcement of International justice'⁵⁴. Because, the Court works to eliminate any chance of impunity to be given to perpetrators of dangerous International Crimes and it aims to prohibit these crimes⁵⁵. Therefore, certain powers were given to the strong political body of the United Nations to help the Court in achieving this objective⁵⁶. But, the practice of the Security either via utilizing article 13(b) or article 16 could be said that surprised the drafters of the Rome Statute, the Court in cases the referral of Sudan or the suspension of the Courts' jurisdiction via resolution 1422 seemed to be a 'loser' in the eyes of International Community, because the Security Council used its' powers under the Statute to reaffirm its

54. see R.Cryer and others, , *An Introduction to International Criminal Law and Procedure*(CUP,2007)

54 .L.P Francis and J.G. Francis, International Criminal Court,the Rule of Law, and the prevention of harm: Building justice in times of justice, In May Lary and Hoskins Zachary(eds) *International Criminal Law and Philosophy* (CUP,2010)

56. H.Olosalo, The Prosecutor of the ICC before the initiation of investigation: Quasy judicial or Political body?[2003]3 *international Criminal Law Review* 87 ,p88

57. *ibid*,p88

58. J.Vertibsky, above, n51,p150

59L.Moss, *supra* note 25, p13

60.*ibid*

61. . L.M. Keller, The False Dichotomy of Peace versus Justice and International Criminal Court[2008] 3 *Hague Justice Journal*

hegemony over the newly established body⁵⁷. Therefore, it is highly recommended that the Security Council must 'respect the independent judicial process' when the prosecutor has started the investigation it should not defer and do not utilize Article 16 for political motivation, and co-operate with the Court in enforcing its decisions, consequently preserving the reputation of the ICC as an independent effective judicial body in enforcing judicial International Criminal Law⁵⁸. Furthermore, when article 13(b) it should be *objective* and *consistent*⁵⁹, and the Security Council utilizes its power of deferral when there is a decisive need, or there is a significant threat on international peace and security⁶⁰. Before, deciding on the requests the Court should evaluate the situation to ensure that the referral or deferral will not deter its major aims of enforcing International Criminal Law and achieving International Criminal Justice⁶¹. Furthermore, obtaining the ICC's major aim of becoming an effective tool for enforcing International Criminal Law it is better if the role of the Security Council is limited (or not have) in determining the Crime of Aggression, because the successes of the ICC as an effective judicial body requires to be independent, and pre-determination of an important and significant crime of which it has jurisdiction on by a political body impedes the legality of the Court⁶². Otherwise, it 'loose' its reputation, legitimacy, and Credibility as an effective Court⁶³.

61. *ibid*, p20

63. J Vertibsky, above n54, p153

64. *Ibid*, p150-151

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الملخص

بعد سنين طويلة من المحاولات ، دخلت اتفاقية المحكمة الجنائية الدولية حيز التنفيذ في شهر تموز 1998 ، و الذي بموجبه قررت تشكيل محكمة جنائية دولية ذات اساس رضائي. تشكيل هذه المحكمة تعد خطوة كبرى نحو تحقيق العدالة و المسؤولية الدوليين، وتحدي العفو عن هؤلاء الذين يرتكبون جرائم خطيرة ،كالجينوسايد ، جرائم الحرب ،والجرائم ضد الانسانية ، والعدوان . وقد قصد به واضعوه ان يكون هيئة قضائية مستقلة عن الامم المتحدة ، وخصوصا عن الهيئة السياسية للامم المتحدة (المجلس الامن الدولي). هذا مع اعطاء صلاحية للمجلس الامن في تعريف (جريمة العدوان) وفقا لمادة (5ف2) من النظام الاساسي للمحكمة . و صلاحية اعطاء التوصيات وفقا لمادة 13(ب) من نظام المحكمة،بالاضافة لصلاحياته في (التاجيل) وفقا للمادة 16 من النظام الاساسي للمحكمة.

اعطاء هذه الصلاحيات للمجلس الامن الدولي وفقا للنظام المحكمة الجنائية الدولية أدت الى جدالات كثيرة وكبيرة على الصعيد الدولي . وهكذا، هذا البحث يناقش تاثير هذه الصلاحيات على المحكمة ، ويناقش ، هل تؤدي هذه الصلاحيات الى نتائج الجابية ام سلبية على المحكمة كجهاز قضائي فعال لتحقيق العدالة الدولية؟

بمؤخته

دواي چهندين سال له كوشش، دواچار پهيمان نامهي دادگاي تاوانه نيو دهولتيه كان له ته مموزي 1998 چووه بواري جيئبه جيئكرندنه وه. به پيي نهو پهيمان نامهيه، برباردرا به بيك هيئاني دادگايهك بو تاوانه نيو دهولتيه كان كه بنچينهيهكي رهزامه نديانهي ههيه. بيئكه يئاني نهو دادگايه به ههنگاويكي مهزن دادهنريت له بهديه يئاني دادپهروهرى و بهرپرسياريتي نيو دهولتي، و بهرهنكار بوونه وهى ليئووردن بو نهو كهسانه ي كه تاوانى نيو دهولتي وهك جينو سايد، تاوانى جهنگ،تاوانى دژ به مرؤفايه تي، دامه زرينه راني دادگاكه مه بهستيان بووه كه ببئت به دهسته يهكي سه ربه خو له ريئخراوى نهته وه يه كگرتووه كان به تايبه تي له دهزگا سياسي هكي ريئخراوه كه (نه نجوومه ني ناسايشى نيو دهولتي). سه رهراي نه وه، سيستمى بنچينه يي دادگاكه كومه ليك ده سلاتي به خشى به نه نجوومه ني ناسايش، به پي يئي مادده كانى (5،2) و (13،ب)، (16) له سيستمى بنچينه يي ريئخراوه كه.

بيئداني نهو دهسه لئاتانه به نه نجوومه ني ناسايشى نيو دهولتي مشت و مريكي زوري دروست كردووه له سه ر ناستي نيو دهولتي، هه ر بويه نهو تويژينه وهيه گفتوگو دهكات له سه ر كاريگه ريبه كانى نهو دهسه لئاتانه له سه ر دادگاكه، و وولامى نهو پرسياره ده داته وه كه نايا به خشيني نهو دهسه لئاتانه له خزمه تي كارو چالاكيه كانى ريئخراوه كه دان وهك دهزگايه كي دادوهرى چالاك بو بهديه يئاني دادگه رى نيو دهولتي يا خود نا؟