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International Criminal Court and the UN Security Council – a difficult relationship

*“All that’s necessary for the forces of evil to win in the world
is for enough good men to do nothing.”*

- Edmund Burke (1770)

1) Introduction

International Criminal Court (ICC), which came to life in Rome in 1998 and became operational in 2002, reflects 67 years of our common struggle with our own faulty humanity. In 1945 people have made promise for unspeakable horrors of the World War II to repeat “never again,” yet cruelty of crimes committed worldwide in the years since that wishful promise, surpassed even the darkest moments of the Nazi-era concentration camps. In 1945 national community was determined to set a course where greater respect for human rights, or human life for that matter, would be adopted as a set of standards and principles and implemented by each and every state, yet we ended up with not only needing *ad hoc* tribunals to adjudicate on horrific crimes and grave human rights violations and abuses, but with an actual permanent criminal court to stand between us and the worst of our humanity. Demands for international criminal justice could no

longer be ignored,¹ and first bold steps were taken, carrying the legacy and promise of Nuremberg over the *ad hoc* tribunals all the way to the International Criminal Court.

The road to the ICC was a long and a hard one, sparking more than one heated debate over its establishment, and once it came to life debates seem only to increase. One point in particular appears to generate most of the attention: relationship between the ICC and the UN Security Council, and impact such relationship might have on the future of the Court and international criminal justice in general. It will be a focus of this paper as well, through cases where the relationship stands out bolded and underlined.

2) International Criminal Court and the UN Security

Council

The idea behind the adoption of the Rome Statute of the International Criminal Court in 1998 was that the investigation and prosecution of international crimes should be taken out of a context of power politics and would be conducted on a permanent basis and by an independent (transnational) judicial entity that operates according to the principle of the separation of power, which is the basic requirement of the rule of law.² Idea was not a

¹ Acting under Chapter VII of the UN Charter, Security Council exercised its power to decide on measures necessary to maintain or restore international peace and security by setting up two *ad hoc* tribunals. In 1993, by resolution 827 (1993) the International Criminal Tribunal for the former Yugoslavia (ICTY), and in 1994, by resolution 955 (1994), the International Criminal Tribunal for Rwanda (ICTR), see Cassese, Antonio, “*International Law*,” 2nd Edition, Oxford University Press, 2005, page 453-455

² Köchler. Hans, “*Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice*,” International Progress Organization Online Papers, 7 April 2009, www.i-p-o.org/koechler-ICC-politicization (accessed 23 October 2010)

new one,³ but it held a renewed hope and desire of people around the world to finally put an end to the culture of impunity and selective and unsystematic delivery of justice.

In addition to that, the significance of the ICC lies not only in its promise as the mechanism for helping prevent repetition of the massive atrocities to which the 20th century was witness, but also in the nature of its jurisdiction: unlike the International Court of Justice (ICJ), which has jurisdiction only over states, the ICC has jurisdiction over *individuals*.⁴ The ICC was intended to be a credible, independent judicial body, able to adjudicate the most serious of international crimes fairly and impartially, where

³ The possibility of a permanent court had been envisioned by the UN shortly after the World War II and the Nuremberg Trials. In Resolution 260, dated 9 December 1948, the General Assembly invited the International Law Commission to study the desirability and possibility of a permanent international criminal court. The Commission then codified the principles established in the Nuremberg trials and prepared draft statutes for a permanent court. The intensification of the Cold War in the late 1940s quickly paralyzed the effort, but it received renewed impetus after the end of the Cold War in 1991 when, in response to widespread atrocities in Rwanda and the former Yugoslavia, the UN Security Council established *ad hoc* criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 (resolution 827) and in 1994 (resolution 955) the International Criminal Tribunal for Rwanda (ICTR), to try alleged perpetrators of genocide, war crimes, crimes against humanity, and other serious violations of international humanitarian law in those particular conflicts. The Rwandan and Yugoslav tribunals revitalized an international criminal jurisprudence that had not developed since the Nuremberg and Tokyo trials. Their experience revived an idea of the creation of a standing forum where justice can be rendered for the gravest crimes when national courts are unwilling or unable to do so. By 1994 the International Law Commission submitted to the General Assembly its initial draft statute for a permanent international court and in 1998 more than 150 countries completed negotiations to establish the International Criminal Court (ICC), a permanent international court charged with prosecuting war crimes, crimes against humanity and genocide in such circumstances. Generally speaking, this reflects the jurisdictional reach of the *ad hoc* tribunals, being a combination of ICTY Articles 2-5 and ICTR Articles 2-4, to which the crime of aggression has been added. See Abizadeh, Arash, "Introduction to the Rome Statute of the International Criminal Court," *World Order*, 2002-03, Vol.34, No.2, page 19, <http://profs-polisci.mcgill.ca/abizadehPDFs/ICC.pdf> (accessed 3 March 2012). Also, Dicker, Richard and Keppler, Elise, "Beyond The Hague: The Challenges of International Justice," Human Rights Watch's World Report 2004, 27 January 2004, www.hrw.org/news/2004/01/26/beyond-hague-challenges-international-justice (accessed 5 April 2012) and Cassese, Antonio, "International Law," 2nd Edition, Oxford University Press, 2005, page 456

⁴ It is the first permanent international court that recognizes individual as a subject of international criminal law and, as such, seems philosophically to presuppose the notion of a global community of which all human beings are subjects, if not citizens. See Abizadeh, Arash, "Introduction to the Rome Statute of the International Criminal Court," *World Order*, 2002-03, Vol.34, No.2, page 20, <http://profs-polisci.mcgill.ca/abizadehPDFs/ICC.pdf> (accessed 3 March 2012)

national judicial systems have failed. It has automatic jurisdiction over genocide, war crimes and crimes against humanity, and an independent Prosecutor to initiate prosecutions either occurring on the territory of a state party or allegedly committed by a national of a state party.⁵ And finally, it is characterized with one important connection to the prime source of the power politics at this moment, the UN Security Council.

a) Articles 13 (b) and 16 of the Rome Statute

The Security Council itself played no role in the creation of the ICC, as in the creation of the two *ad hoc* tribunals, although its members were active participants in the negotiations at the final Diplomatic Conference in Rome in 1998.⁶ The connection to the UN Security Council however could not be avoided, as it was a subject of a long and tiresome debate during the negotiations⁷ and, by now well known Articles 13 (b)⁸ and

⁵ Moss, Lawrence, “*The UN Security Council and the International Criminal Court: Towards More Principled Relationship*,” Friedrich Ebert Stiftung, March 2012, page 2, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

⁶ However, influence of the UN in shaping the psychology and the process of the negotiations for the Rome Statute was inevitable. Experience in the UN system gave many participants a strong, often emotional, commitment to the ideals and purposes of the ICC. Confidence in the process clearly came from the work of the *ad hoc* tribunals for Rwanda and the former Yugoslavia. Moreover, each of the hundreds of conflicts and the millions of lives lost in the last fifty years has been on the agenda of some part of the UN. In their speeches in the negotiations for the ICC, countries such as Sierra Leone, Argentina, Germany, Bosnia and Herzegovina and Sri Lanka spoke powerfully of their countries’ histories of genocide, war crimes and crimes against humanity. For the same reasons, and for some of its own, the UN and its Secretary-General made an early and irreversible institutional commitment to the ICC. For more, see Washburn, John, “*The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*,” Pace International Law Review, 1999, Vol.11, Issue 2, page 364-365, <http://digitalcommons.pace.edu/pilr/vol11/iss2/4> (accessed 21 December 2011). Also Moss, Lawrence, “*The UN Security Council and the International Criminal Court: Towards More Principled Relationship*,” Friedrich Ebert Stiftung, March 2012, page 3, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

⁷ The great majority of states favored giving the UN Security Council power to refer situations to the ICC, although a significant minority did warn of the dangers of politicizing the Court and undermining its independence. More controversial was whether the Council would have power to block investigations or prosecutions. The permanent members of the UN Security Council (except the United Kingdom) generally

16,⁹ became both the force behind as well as the stumbling stones for the international criminal justice.

The power of referral by the UN Security Council under Article 13 (b) in itself is considered to be one of the specific features of modern international law. Views of many scholars have conflicted over this particular item of the Rome Statute, offering different perspectives on its substance and utilization.¹⁰

sought a role for the Council in filtering cases that could go to the Court, especially by a bar to ICC action regarding any situation that was on the agenda of the Council unless the Council consented to ICC involvement. In the final compromise, the Council was given the power only to defer investigations or prosecutions for renewable one year period. However, some scholars made interesting point on power of deferral noting that, even as a powerful instrument for the highest political organ of the UN to control the activity of the ICC, Article 16 read in connection with other provisions of the Rome Statute (especially Article 53) allows for the ICC as well to take into account political considerations. As a result, ICC should not be considered as condemned to act as a narrow-minded judicial body. Finally, it is to be noted that both provisions, on referral and deferral, require the Council's action under Chapter VII of the UN Charter which sets out that body's coercive powers. See Moss, Lawrence, "*The UN Security Council and the International Criminal Court: Towards More Principled Relationship*," Friedrich Ebert Stiftung, March 2012, page 3, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012). Also, Köchler, Hans, "*Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice*," International Progress Organization Online Papers, 7 April 2009, www.i-p-o.org/koechler-ICC-politicization (accessed 23 October 2010), and Kastner, Phillip, "*The ICC - Savior or Spoiler? Potential Impacts of International Criminal Justice on Ending the Darfur Conflict*," McGill University, August 2007, <http://digitool.library.mcgill.ca/thesisfile18691.pdf> (accessed 25 January 2012)

⁸ The ICC may exercise its jurisdiction over crimes listed in the Rome statute, beside being referred by the State Party and having investigation initiated by the Prosecutor *proprio motu*, if "(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." This Article – in connection with the specific provisions of Article 12 (2) - gives authority to the UN Security Council to refer a "situation" to the ICC also in cases where the Court has no jurisdiction *per se*, meaning that the UN Security Council, the supreme executive organ of the UN, can effectively create jurisdiction where it otherwise would not exist on the basis of the Rome Statute. See Köchler, Hans, "*Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice*," International Progress Organization Online Papers, 7 April 2009, www.i-p-o.org/koechler-ICC-politicization (accessed 23 October 2010)

⁹ "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."

¹⁰ As provided by some scholars, the Council, making decisions under Chapter VII of the UN Charter as an enforcement action for the maintenance of international peace and security, is fully authorized to act in this respect. This has been explained with the fact that the UN Security Council acted in similar manner when

On the other hand, Article 16, in Rome, was considered as a clever compromise between the states who wanted an independent Prosecutor and the United States wanting to control the Prosecutor through the UN Security Council. It was only meant to curb the Prosecutor if his actions would, in exceptional circumstances, be considered a threat to international peace and security, not to push political interest of UN member states and not to be the basis for a kind of conditional referral or a referral under a treat of deferral.¹¹

The connection between the UN Security Council and the ICC, once set in motion, pushed to the surface all the challenges international community still needs to face in its fight against impunity, revealed in either utter indecisiveness or failure to act on some of its own decisions on one side of the spectrum, or remarkable determination in addressing atrocities committed against innocent an unarmed people on the other. Everything in between can arguably be considered as a nuance of either sides, depending on the course UN Security Council is taking at the moment, the support it is ready to lend or what

creating ICTY and ICTR, as confirmed in the decision of the Appeals Chamber of the ICTY, which stated that the Council is empowered and competent to set up tribunals for above purposes. The intention of the particular provision of the Rome Statute, therefore, is to remove the need for the creation of *ad hoc* tribunal in the future, where for that matter the referral to the ICC in cases of maintenance of international peace and security would confer upon the Court the competence to act as an *ad hoc* tribunal. As such, the effect of the UN Security Council's decision would be binding on all members, whether or not they are parties to the Statute, since it is tied to the enforcement power of the UN Security Council under Chapter VII of the UN Charter. Others, however, argued that by effectively *creating* jurisdiction where it otherwise would not exist on the basis of the Rome Statute, provision of Article 13 (b) is in violation of the general principle of international law, according to which only states party to a treaty are bound by that treaty's provision. See Lee, Roy S., "An Assessment of the ICC Statute," Fordham International Law Journal, 2001, Vol.25, page 761-763, <http://ir.lawnet.fordham.edu/ilj/vol25/iss3/13/> (accessed 11 April 2012). Also, Köchler, Hans, "Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice," International Progress Organization Online Papers, 7 April 2009, www.i-p-o.org/koechler-ICC-politicization (accessed 23 October 2010)

¹¹ Article 16 has certainly never been imagined as a tool in the hands of the UN Security Council to suspend an investigation or prosecution based on a referral by the UN Security Council itself. See Stuart, Heikelina Verrijn, "UN and ICC: Not the Easiest Relationship," Radio Netherlands Worldwide, 21 September 2008, www.globalpolicy.org/component/content/article/164-icc/28591.html (accessed 17 January 2012)

action it will undertake. It resulted thus far in uneven and, as some can perceive¹², unprincipled approach to the international criminal justice, as a direct result of the system that was created. However, the opportunity this connection creates to act in united and strong front in wiping impunity straight into dictionary appears to be lost on many, but the UN Security Council in particular. It is yet to be realized that, even if not originally envisioned and desired, the connection created between the two institutions, can and should be used in both strengthening the efforts in maintaining peace and security, as well as advancing the interest of justice, having always and primarily in mind unprotected, civilians and victim of atrocious crimes. In addition to that, and based on the examples from the recent past, it is time for some somber reflection upon it, as the credibility of both institutions is put at stake during their mutual exchange under the given circumstances.

Two are the liveliest examples today of the struggle presented, to balance and unite demands of the power politics of the UN Security Council and quite vocal and no longer ignorable presence of the ICC: cases of the Sudan and Libya. At the heels of the controversy these two issues still raise, situation in Syria brings additional layer to the whole story surrounding the existing symbiosis of the two institutions.

¹² Some scholars have been pointing out that, due to the provisions of the Articles 13 (b) and 16, exercise of jurisdiction of the Court is effectively subjected to the vagaries of international power politics and, due to the voting procedure laid out in Article 27 of the UN Charter, it will essentially depend upon the 5 veto-wielding permanent members of the Council whether the ICC will exercise jurisdiction on the territory or in regard to citizens of non-States Parties. This great power privilege unavoidably imposes upon the ICC a practice of selective justice and the application of double standards. See See Köchler. Hans, “*Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice*,” International Progress Organization Online Papers, 7 April 2009, www.i-p-o.org/koechler-ICC-politicization (accessed 23 October 2010)

3) Resolution 1593 (2005)

Decision of the UN Security Council to refer situation in Darfur to the International Criminal Court in 2005¹³ was characterized as historic.¹⁴ Historic in a way that for the first time UN Security Council referred a situation to the ICC,¹⁵ even if the state in question was not a party to the Rome Statute, and as a result of the investigation, the ICC issued for the first time an arrest warrant for the sitting head of state.

This exceptional jurisdiction was predicated on the UN Security Council's determination that the situation in Sudan constituted a threat to international peace and security under Article 39 of the UN Charter. It also reflected the conviction that trials of persons responsible for the human rights violations in Darfur will help restore peace and stability to the country and the region. Acting with respect to the UN Security Council's

¹³ In accordance with Article 13 (b) of the Rome Statute, on 31 March 2005 UN Security Council passed the resolution 1593 (2005), referring the situation in Darfur to the ICC, with 11 votes in favor, none against and 4 abstentions (Algeria, Brazil, China, United States).

¹⁴ Historic as it may be, and notwithstanding all of the above, 400,000 people vanished in the horror called Darfur, followed by the humanitarian crisis unrecorded in the past century.

¹⁵ There was without a doubt a strong factual basis for the Council's first referral. Fighting began between Darfur rebel groups and the Sudanese government in February 2003, with the government arming and supporting "Janjaweed" militias which committed widespread ethnic cleansing against tribes from which rebels were drawn. By November 2004, many tens of thousands of people had been killed, some 1.65 million internally displaced, with another 200,000 driven across the border into Chad. Hundreds of villages in the three states of Darfur were burned and destroyed, with indiscriminate attacks on civilians, rape, looting and torture. The Council followed a credible process for making the Darfur referral. It began by issuing a presidential statement expressing deep concern over the humanitarian crisis in April 2004, and condemned the violence by all parties in Resolution 1547 adopted in June 2004. In resolution 1556, adopted under Chapter VII in July 2004, the Council determined that the situation in Sudan constituted a threat to international peace and security indicated that there was criminal responsibility for the violence being committed, and urged Sudanese government to investigate and prosecute those responsible. Finally, in September 2004, the Council adopted resolution 1564 under Chapter VII, establishing a commission of inquiry to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties. See Moss, Lawrence, "*The UN Security Council and the International Criminal Court: Towards More Principled Relationship*," Friedrich Ebert Stiftung, March 2012, page 5, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

referral and at the request of the ICC prosecutor, the ICC pre-trial chamber had issued arrest warrants or summonses for four Sudanese officials.¹⁶ The Government of Sudan, under Al-Bashir, has objected to this exercise of jurisdiction in relation to Sudan. It has argued that Sudanese sovereignty is being violated – both by the UN Security Council and the ICC.¹⁷

The referral by the UN Security Council in connection with the situation in Darfur engendered much initial euphoria, particularly due to the fact that the US abstained when the resolution providing for that referral was passed, notwithstanding its ideologically motivated opposition to the ICC.¹⁸ The resolution was justly heralded as a major advance for the Court, allowing investigation and prosecution of crimes committed in a major humanitarian crisis that would otherwise be outside Court's jurisdiction, as the Sudan was not a state party to the Rome Statute. However, certain provisions of the resolution,

¹⁶ Among these, the most controversial had been its approval of a warrant of arrest for Sudan's President Bashir – which warrant was reissued at the later stage to add genocide charges. See Akande, Dapo; Du Plessis, Max; Jalloh, Charles Chernor, *"An African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC,"* Institute for Security Studies, 2010, page 5, www.iss.co.za/uploads/positionpaper_icc.pdf (accessed 7 January 2012)

¹⁷ Sudan's objections have predictably resulted in a tense relationship and limited to non-existent cooperation with the ICC. See Akande, Dapo; Du Plessis, Max; Jalloh, Charles Chernor, *"An African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC,"* Institute for Security Studies, 2010, page 5, www.iss.co.za/uploads/positionpaper_icc.pdf (accessed 7 January 2012)

¹⁸ Going beyond the commission of inquiry report and many NGOs, the United States has labeled the crimes in Darfur as "genocide," but was adamantly opposed to the ICC, and sought creation of an ad hoc international or hybrid criminal tribunal to prosecute the violations. Rather than veto the referral resolution, the US was eventually persuaded by other Council members to abstain and allow it to pass, still noting that the US "fundamentally objects" to ICC jurisdiction over the nationals of states not party to the Rome Statute and therefore does not agree with the referral. China also abstained, stating its opposition to a referral made over the opposition of the Sudanese government. Moss, Lawrence, *"The UN Security Council and the International Criminal Court: Towards More Principled Relationship,"* Friedrich Ebert Stiftung, March 2012, page 5-6, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012). Also, Bassiouni, Cherif M., *"The ICC – Quo Vadis?"*, Justice of International Criminal Justice, 2006, Volume 4, page 425

as the consequent indolence of the Council in support of its own decisions, undermined its own credibility, as well as the credibility of the Court in exercising its mandate.¹⁹

a) Flaws of the referral and shortcomings of international criminal justice

Undisputedly, referral of a “situation” in which international crimes may have been committed to the Court’s Prosecutor is sufficient basis for the exercise of jurisdiction by the ICC – which is of particular importance in cases where the Court would otherwise have no jurisdiction on the basis of territoriality or nationality. However, wording of Article 13 (b) of the Rome Statute clearly states that any referral of a situation by the UN Security Council must be made without conditions as to the categories of people to be investigated or prosecuted by the Court, and that is where the Darfur referral starts to show some disturbing manipulations of the relevant provisions of the Rome Statute by the UN Security Council.²⁰

At the behest of the US in particular, four significant concessions were written into the resolution (leading Brazil on the other hand to abstain on the resolution as a result of it). Marked by many as clearly inadmissible, the UN Security Council has tied the *referral* of the situation in Sudan according to Article 13 (b) of the Rome Statute to a

¹⁹ Moss, Lawrence, “*The UN Security Council and the International Criminal Court: Towards More Principled Relationship*,” Friedrich Ebert Stiftung, March 2012, page 5, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

²⁰ Köchler, Dr. Hans, “*Double Standards in International Criminal Justice: The Case of Sudan*,” International Progress Organization, 2 April 2005, page 1, <http://i-p-o.org/Koehler-Sudan-ICC.pdf> (accessed 23 October 2010). Also, Köchler, Dr. Hans, “*Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice*,” International Progress Organization Online Papers, 7 April 2009, www.i-p-o.org/koehler-ICC-politicization (accessed 23 October 2010)

deferral of investigation or prosecution according to Article 16.²¹ Presumably under that power, paragraph 6 of the resolution then shields from jurisdiction of the ICC nationals of non-party states (other than Sudan) participating in UN or AU operations in Sudan. Giving blanket immunity from ICC jurisdiction to a broad category of participants went beyond the powers granted to the Council in Article 16.²²

The preamble also notes the bilateral agreements with many states extracted by the US providing that US nationals would not be surrendered to the ICC.²³ Further, paragraph 7 of the resolution purports to bar the UN from paying any of the ICC's costs for investigation and prosecution regarding Darfur, and requires that the parties to the

²¹ The preamble of the resolution does not even cite Article 13 (b) of the Rome Statute, but cites only the power of deferral under Article 16. While the UN Security Council, under the Court's Statute, has the right to refer "situation" (and not the individual cases) in which crimes that fall under the jurisdiction of the Court appear to have been committed to the Prosecutor of the Court, the Council has no authority to order a deferral of investigation or prosecution on a *selective* and at the same time *preventive* basis. Similarly, Article 16 cannot be construed in such a way as to grant immunity from prosecution to certain categories of people. Using Article 16 to restrict Article 13 (b) – to render that article "harmless" for a powerful non-state Party, as resolution 1593 (2005) has effectively done – is an exercise in sophistry for the sake of power politics; it is an inadmissible effort by a political body of exercising control over the ICC. Köchler, Dr. Hans, "Double Standards in International Criminal Justice: The Case of Sudan," International Progress Organization, 2 April 2005, page 2, <http://i-p-o.org/Koehler-Sudan-ICC.pdf> (accessed 23 October 2010). Also, Moss, Lawrence, "The UN Security Council and the International Criminal Court: Towards More Principled Relationship," Friedrich Ebert Stiftung, March 2012, page 6, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

²² For the theoretical value of establishing immunity from the ICC, the Council exacted a serious toll on its own credibility and the independence and legitimacy of the ICC, violating principles of equality before the law. Moss, Lawrence, "The UN Security Council and the International Criminal Court: Towards More Principled Relationship," Friedrich Ebert Stiftung, March 2012, page 6, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

²³ By noting these as "agreements referred to in Article 98-2 of the Rome Statute," the resolution seeks to legitimize them, contrary to the view of many international law experts that these agreements misuse Article 98-2 to gain prospective impunity for US nationals for the crimes defined in the Statute. See Moss, Lawrence, "The UN Security Council and the International Criminal Court: Towards More Principled Relationship," Friedrich Ebert Stiftung, March 2012, page 6, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

Rome Statute pay those costs.²⁴ Finally, unlike the resolutions which established the ICTY and ICTR, the resolution does not *require* all UN member states to cooperate with the investigation and prosecution, but merely *urges* their cooperation.²⁵

Despite the flaws of the referral enlisted above, resolution 1593 (2005) was a starting point for the investigation which directed a harsh light and added greater weight of reality and responsibility for the atrocities and unimaginable horrors that were happening not only in Darfur, but all around Sudan, and for those who committed them.²⁶ But instead of maintaining the momentum, and seizing the opportunity to set a strong, credible precedent for any future interactions under the relevant provisions of the Rome Statute, along instating the ICC as one of its allies,²⁷ the UN Security Council all but bailed out of

²⁴ This was not the UN Security Council's decision to make regarding the ICC referral costs, and it should have remained silent. Article 17 of the UN Charter grants the General Assembly exclusive authority over budgetary matters.

²⁵ Still, it needs to be pointed that when the Council acts under Chapter VII to refer a situation to the ICC, it should back up the Court with its full power to mandate cooperation by all UN members. Moss, Lawrence, "The UN Security Council and the International Criminal Court: Towards More Principled Relationship," Friedrich Ebert Stiftung, March 2012, page 6, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

²⁶ For some, the pressure of the investigation and subsequent issuance of arrest warrants was even considered as a much necessary leverage of the international community in pressuring Sudanese government into continuation of the peace talks, as it was clearly obvious that roughly 2000 AU soldiers then on the ground were insufficient to stop the killing and displacement, and Council imposed no sanctions or punitive measures of any kind against the Sudanese government. In addition, the referral and the first two arrest warrants issued in 2007 could have helped pressure the Sudanese government's acceptance of the eventual UN-AU peacekeeping force (UNAMID). However, those who are skeptical of any influence referral might have had, might observe that the killings in Darfur continued unabated after the referral, and even now ICC indicted Ahmed Haroun serves as governor of Sudan's Southern Kordofan state. See Moss, Lawrence, "The UN Security Council and the International Criminal Court: Towards More Principled Relationship," Friedrich Ebert Stiftung, March 2012, page 7, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

²⁷ Kastner, Phillip, "The ICC - Savior or Spoiler? Potential Impacts of International Criminal Justice on Ending the Darfur Conflict," McGill University, August 2007, <http://digitool.library.mcgill.ca/thesisfile18691.pdf> (accessed 25 January 2012)

the referral of its own doing. Even when the ICC's Prosecutor repeatedly presented the grim realities of the situation on the ground, and indicated Sudan's refusal to cooperate with the Court in clear violation of the provisions of the UN Security Council resolution, nothing happened. True and hands on support of the UN Security Council in backing up the Court in the years since the referral, and in particular in connection to the issued arrest warrants, was sadly missing.²⁸ This pattern can be somewhat rationalized by the entrenched attitude of the UN Security Council in waging benefits of justice for the peace processes it negotiates,²⁹ however it repeatedly disregards that sustainability of peace oftentimes hinges on the ability of societies to find justice and reconciliation.³⁰ In the

²⁸ China, for example, opposed the arrest warrants from the beginning, in particular the one issued for President Al-Bashir, calling for its suspension on the basis that it could interfere with the peace process in Darfur. It strongly argued that the overall interests of peace and security should not be compromised and that the chances to resolve the Darfur crisis through a political solution would be slim to nonexistent without the full cooperation of the Sudanese government. Most inappropriately for a permanent member of the UN Security Council, China hosted a visit by Al-Bashir in June 2011, as stated in Prosecutor's 14th Report to the UN Security Council, in December 2011. Even if not a member of the Rome Statute, but as a permanent member of the Council, China has even greater responsibility for carrying out the decision of the UN SC. The arrest warrant also caused a serious rift between the UN and the African Union, which lasts even to this very day, with sometimes varying intensity. The AU Peace and Security Council, engaged over the years with Sudanese authorities in a mediation process aimed at finding a political solution to the Darfur conflict, and the Organization of the Islamic Conference (OIC) both requested that the UN Security Council suspend prosecution under Article 16, with support from the Arab League. UN Security Council member South Africa and Libya proposed that the pending resolution to renew the mandate of UNAMID include deferral of the ICC proceedings, and were supported by Russian Federation, China, Burkina Faso, Indonesia and Vietnam. Three P-5 members (France, the UK and the US) were opposed to a deferral. See, Akande, Dapo; Du Plessis, Max; Jalloh, Charles Chernor, "An African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC," Institute for Security Studies, 2010, page 10, www.iss.co.za/uploads/positionpaper_icc.pdf (accessed 7 January 2012). Also, Moss, Lawrence, "The UN Security Council and the International Criminal Court: Towards More Principled Relationship," Friedrich Ebert Stiftung, March 2012, page 7, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

²⁹ Some commentators, however, are of the opinion that all too often the so-called peace processes are merely mirages and political rhetoric, and no reason to postpone or stop attempt to bring perpetrators of horrendous crimes to justice. Stuart, Heikelina Verriijn, "UN and ICC: Not the Easiest Relationship," Radio Netherlands Worldwide, 21 September 2008, www.globalpolicy.org/component/content/article/164-icc/28591.html (accessed 17 January 2012)

³⁰ See Kantareva, Silva, "How Does the United Nations Security Council Affect International Justice?," 23 July 2009, <http://hausercenter.org/jhr/2009/07/23/on-international-justice-and-the-united-nations-security-council/> (accessed 16 October 2010)

case of Sudan this observation is even more pronounced, as the reluctance of the Sudanese government to incapacitate those individuals most responsible for the crimes committed in Darfur, ideally by surrendering them to the ICC, prolongs the conflict and makes new offences possible. The UN Security Council, in using its powers under Chapter VII by stipulating that the failure of the Sudanese Government to cooperate with the ICC represents a threat to peace and security, would make a clear and strong demonstration of its undivided commitments to both the peace and justice.³¹

4) Resolution 1970 (2011)

So unlike the resolution concerning the referral for Darfur, everyone appeared to be onboard when, in February 2011, the international community decided that the situation in Libya should be investigated by the ICC. Not only did the UN Security Council refer the situation in Libya to the Court, but resolution 1970 (2011) was passed unanimously.³²

³¹ This would be the next logical step, which would then be the basis for further collective measures. The mere threat of collective diplomatic sanctions or of divestments from Sudan could have positive effects. Kastner, Phillip, "*The ICC - Savior or Spoiler? Potential Impacts of International Criminal Justice on Ending the Darfur Conflict*," McGill University, August 2007, page 88, <http://digitool.library.mcgill.ca/thesisfile18691.pdf> (accessed 25 January 2012)

³² It was adopted on Saturday, 26 February 2011, as a part of a robust set of UN Security Council measures directed at the Libyan regime, including a travel ban and assets freezes for Libyan leader Muammar Gaddafi and his associates, and an arms embargo. The vote for resolution 1970 followed increasing reports of gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, and detention and torture of peaceful demonstrators. The UN Security Council was also mindful of expressions of concern and condemnation of the Gaddafi regime from high-profile regional and global bodies, several of which called for some type of international intervention. Du Plessis, Max and Louw, Antoinette, "Justice and the Libyan crisis: the ICC's role under Security Council Resolution 1970," Institute for Security Studies, 31 May 2011, page 1, www.issafrika.org (accessed 15 January 2012). Also, Kersten, Mark, "*An Arab Fling: The West and International Justice in Libya*," Opinio Juris, 25 September 2011, <http://opiniojuris.org/2011/09/25/an-arab-fling-the-west-and-international-justice-in-libya/> (accessed 17 January 2012)

In Libya as in Darfur, it was only the use of the Council's power of referral that made justice and accountability possible, extending the reach of the Court to states that had chosen not to become parties to the Rome Statute,³³ and as in the case of Darfur some of the same issues, as well as few of the new, surfaced.

a) *Justice or political retaliation*

Like the Darfur referral, resolution 1970 (2011) also excludes some non-ICC states parties. Legally questionable, as argued by some commentators, it is also stated that referral again makes mockery of the principle of equality before the law, and due to its political tailoring in order to exclude non-states parties from the ICC's jurisdiction both undermines the Court's ultimate aim to achieve universal jurisdiction and suggest at a hierarchy wherein similar crimes within the same context cannot be similarly investigated and prosecuted.³⁴ The referral also includes a reference to Article 16 of the Rome Statute which allows the UN Security Council to suspend an investigation or prosecution by the Court for 12 month, renewable yearly.³⁵

³³ Moss, Lawrence, "*The UN Security Council and the International Criminal Court: Towards More Principled Relationship*," Friedrich Ebert Stiftung, March 2012, page 9, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

³⁴ Kersten, Mark, "*The ICC and the Security Council: Just Say No*," Justice In Conflict, 29 February 2012, <http://justiceinconflict.org/2012/02/29/the-icc-and-the-security-council-just-say-no/> (accessed 12 April 2012)

³⁵ According to David Scheffer, who formerly led the US delegation in UN talks creating the ICC, the original intent underpinning Article 16 was to grant the UN Security Council power to suspend investigation or prosecution of situations before either is launched if priorities of peace and security compelled a delay of international justice. This conformed with the spirit of the compromise, namely that if the UN Security Council cannot fully control the referral of situations to the ICC, then at least the Council can block the ICC from marching down the investigatory path at the request of a State Party or the Prosecutor. The negotiators' focus was on situations referred by a State Party or the Prosecutor, not by the Security Council. It would be very odd to argue that Article 16 is needed as a check on UN Security Council referrals. As further highlighted, none of the negotiators envisioned kind of scenario that we are

Moreover, under the referral, the ICC's temporal jurisdiction in Libya was restricted to events which occurred after 5 February 2011, which flies in the face of the Rome Statute that stipulates that the ICC can investigate any alleged crimes under its jurisdiction back to 1 July 2002.³⁶ In addition to that, there are some aspects of the Libyan situation and the referral that are different from earlier example. For one, it is the earliest the ICC has ever become involved in situation: just a few weeks since it started, which in itself creates potential for the Court to act as a deterrent for future atrocities, and alter the conflict dynamics in a game-changing manner. The Prosecutor, stepping up to the task, acted quickly on the referral, and after the initial investigation already on 16 May 2011 requested arrest warrants for Muammar and Saif al-Islam Gaddafi, and for the Libyan intelligence chief Abdullah al-Sanusi. However, not relying on the referral alone in order to restore peace and security and in parallel, Council acted on subsequent resolution on Libya, 1973 (2011), which formed a legal basis for military intervention in the Libyan conflict and eventually brought down Gaddafi regime and Gaddafi himself.³⁷

confronted with today, and would be astonished to be told that Article 16 would be applied one day to short-circuit a UN Security Council referral lodged some time before and after the Prosecutor has initiated his investigation pursuant to such referral. For more, see Scheffer, David, "*The Security Council's Struggle over Darfur and International Justice*," JURIST Legal News and Research, 20 August 2008, <http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur.php> (accessed 12 December 2011)

³⁶ The restriction, according to some, means that the cozy economic, political and intelligence relationships between Western states and the Gaddafi regime may never come to light during an investigation. For more, see Kersten, Mark, "*The ICC and the Security Council: Just Say No*," Justice In Conflict, 29 February 2012, <http://justiceinconflict.org/2012/02/29/the-icc-and-the-security-council-just-say-no/> (accessed 12 April 2012) and Kersten, Mark, "*An Arab Fling: The West and International Justice in Libya*," *Opinio Juris*, 25 September 2011, <http://opiniojuris.org/2011/09/25/an-arab-fling-the-west-and-international-justice-in-libya/> (accessed 17 January 2012)

³⁷ By the resolution 1973 (2011) Council demanded "an immediate ceasefire" and authorized the international community to establish a no-fly zone and to use all means necessary short of foreign occupation to protect civilians. Du Plessis, Max and Louw, Antoinette, "Justice and the Libyan crisis: the

Council members, originally strong proponents of the referral, became increasingly interested in finding a peaceful end to the hostilities, and willing to push the judicial process aside.³⁸ It was left to the Prosecutor's office to issue reminder that any peace settlement should respect the decision by the ICC to authorize prosecution of Gaddafi based on the UN Security Council referral.³⁹

Such course of events, despite the fact that at the very beginning the referral was widely celebrated as a new chapter in international justice and the relationship between the ICC and the UN Security Council, even with its questionable legal nature, exposed the principal proponents of the referral to much expected attack for having supposedly sought the referral for political purposes as a precursor to "regime change." It is needless to say that Council members can best affirm the credibility of the referral by supporting the continuing independence of the judicial process it authorized and commitment to achieving international justice steadfast.⁴⁰ It should not be easily taken or even

ICC's role under Security Council Resolution 1970," Institute for Security Studies, 31 May 2011, page 1, www.issafrica.org (accessed 15 January 2012)

³⁸ After the fall of the Gaddafi regime, the priority for the US, UK and France appeared to be their relationship with the new authorities, and not support for the prosecution referred to the ICC. Support for ICC prosecutions has been replaced by declarations that "where to achieve justice is up to the Libyan people." Moss, Lawrence, "The UN Security Council and the International Criminal Court: Towards More Principled Relationship," Friedrich Ebert Stiftung, March 2012, page 10, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012). Also, Kersten, Mark, "An Arab Fling: The West and International Justice in Libya," *Opinio Juris*, 25 September 2011, <http://opiniojuris.org/2011/09/25/an-arab-fling-the-west-and-international-justice-in-libya/> (accessed 17 January 2012)

³⁹ It is disregarded that the decision on whether Libyan courts are entitled to try Saif al-Islam under principles of complementarity rather than the ICC lies with the Court under Articles 17-19 of the Rome Statute. Moss, Lawrence, "The UN Security Council and the International Criminal Court: Towards More Principled Relationship," Friedrich Ebert Stiftung, March 2012, page 10, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

⁴⁰ Moss, Lawrence, "The UN Security Council and the International Criminal Court: Towards More Principled Relationship," Friedrich Ebert Stiftung, March 2012, page 10, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

disregarded that deciding on a referral, the UN Security Council sets in motion a particular chain of events, together with the independent judicial process, which carries within an obligation to both respect and support its course and outcome. Connection between the ICC and the UN Security Council is yet to prove its great potential, when and only if used with interests of humanity in mind, not political gains.

b) What to expect of Syria?

Decision of the UN Security Council to refer situation in Libya to the ICC considered “that widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity” and carried all the weight of the Chapter VII resolution. According to the UN High Commissioner for Human Rights, there is both individual and state responsibility for crimes against humanity likely committed by Syrian authorities, yet the doomed draft resolution against Syria was confined only to the condemnation of “continued widespread and gross violations of human rights and fundamental freedoms,” ignored the declaration of the High Commissioner that “the need for international criminal accountability has acquired even greater urgency” by omitting any reference to a possible ICC referral and, even as such, was shamefully vetoed by China and the Russian Federation.⁴¹

⁴¹ Draft resolution S/2012/77 of 4 February 2012 was a second one to be vetoed by China and the Russian Federation. First one was vetoed in October 2011. See UN Security Council, www.un.org/Depts/dhl/resguide/scact2012.htm (accessed 8 May 2012). Also, Quayle, Peter, “*Syria and the Arab Spring: International Criminal Law after a UN Veto*,” Justice In Conflict, 20 February 2012, <http://justiceinconflict.org/2012/20/02/syria-and-the-arab-spring-international-criminal-law-after-a-un-veto/> (accessed 12 April 2012) and Moss, Lawrence, “*The UN Security Council and the International Criminal Court: Towards More Principled Relationship*,” Friedrich Ebert Stiftung, March 2012, page 10, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

Based on the above, one can rightfully ask whether events that took place in Libya can be seen as any more horrific than what has happening elsewhere, and for UN's top decision-making body to have any moral justifications for such course of (no)-action.⁴² It leaves a bitter aftertaste, since the factual and procedural preconditions are at least pronounced as those that existed in Darfur and Libya when the referrals to the ICC were made, with evidence of crimes against humanity having been committed so glaring and overwhelming.⁴³ It demonstrates, sadly, that no amount of repeatedly and most clearly documented violations has enough power over still deep-rooted ways of functioning of the UN Security Council, for it to seize the given opportunity and be able to bring the world closer to universal ICC jurisdiction for mass atrocities in more consistent manner. In a perfect world, Council members would not allow political motivations or allegiances to obstruct the need for justice and accountability; ideally, the P-5 members would refrain from use of their vetoes and would all become parties to the Rome Statute, enhancing their credibility in referring situations arising in other states.⁴⁴

⁴² Jennings, Simon, "*Libya: Playing Politics With the ICC – The Security Council's referral of Libya to the Hague court highlights the limitations of international justice*," Institute for War and Peace Reporting, March 8 2011, <http://reliefweb.int/node/391454> (accessed 18 April 2012)

⁴³ Chatur, Dharmendra, "*A Synergistic Failure between the UN Security Council and the International Criminal Court*," SelectedWorks, July 2011, page 9, <http://works.bepress.com/dchatur/7> (accessed 10 January 2012)

⁴⁴ Moss, Lawrence, "*The UN Security Council and the International Criminal Court: Towards More Principled Relationship*," Friedrich Ebert Stiftung, March 2012, page 10, <http://library.fes.de/pdf-files/iez/08948.pdf> (accessed 18 April 2012)

5) Conclusion

The fact that even in the 21st century we need to discuss the savagery and cruelty of one's action and have a permanent court to guard us is truly a sad tribute for the commitments we decisively undertook after Nuremberg and Tokyo. With our own humanity on trial, it becomes even more distressing to witness the hesitation towards the support for that one court when it is greatly needed. Nothing can any longer justify a disgraceful measure of tolerance for lingering impunity or hope to contain international criminal justice within the structure that still adheres to the antiquated and misinterpreted notion of sovereignty and sovereigns that are above the law. Justice is not a privilege of a few; it is a right for all, and one to be served without substitutes. No political solution is worth to turn the blind eye to the immense suffering of a human being, and we can safely say that only by properly addressing the past, the crime and those who perpetrated those crimes, future can bring stability, reconciliation and peace.

In that sense the International Criminal Court is intended in creating a new operative definition of our society, where humanity itself is seen as a collective political subject: where the ICC grounds its legitimacy in a direct appeal (in the words of the Rome Statute's preamble) to "the conscience of humanity," to "the international community as a whole," and to the "common bonds" by which "all peoples are united." If the ICC is successful, it will give institutional articulation to humanity as a collective political

subject. The International Criminal Court ultimately refers not to a society of sovereign states but to a sovereign humanity.⁴⁵

Although the ICC must be committed to acting as independently as possible, the Darfur, and subsequent Libya case, however, show that at this particular juncture of its life international criminal justice needs greater political support, and in particular from the permanent members of the Security Council. It is a situation wrapped in paradox from the very beginning: on the one hand, a closer relationship between the power-politics of the UN Security Council and the ICC diminishes the quality and legitimacy of justice; on the other hand without cooperation between the UN Security Council and the ICC, or to put it more frankly, without pursuing justice *through* power-politics, some of the worst international crimes would never be tried.⁴⁶

International support for the ICC is crucial as well in order to increase the effectiveness of the Court. The UN Security Council has the power to determine that the refusal of a national government to cooperate with the ICC represents a threat to international peace and security, which leads to ensuring the enforcement of ICC requests for cooperation and arrest warrants. The proactive role of the UN Security Council after an article 13(b) referral, as much as necessity, will also enable the ICC to become a significant player when the

⁴⁵ Abizadeh, Arash, "Introduction to the Rome Statute of the International Criminal Court," *World Order*, Vol.34, No.2, 2002-03, page 26-27, <http://profs-polisci.mcgill.ca/abizadeh/PDFs/ICC.pdf> (accessed 3 March 2012)

⁴⁶ Kastner, Phillip, "The ICC - Savior or Spoiler? Potential Impacts of International Criminal Justice on Ending the Darfur Conflict," McGill University, August 2007, page 89, <http://digitool.library.mcgill.ca/thesisfile18691.pdf> (accessed 25 January 2012) and Kersten, Mark, "The UN Security Council and the ICC: Between the Rock and the Hard place," *Justice In Conflict*, 6 May 2011, <http://justiceinconflict.org/2011/05/06/the-un-security-council-and-the-icc-between-a-rock-and-a-hard-place/> (accessed 16 April 2012)

international community faces situations of mass atrocities, therefore successfully developing into “an instrument for maintaining international peace and security by the pursuit of justice. However, an important *caveat* should be dutifully issued: the ICC should not be used as a fig leaf by the international community and referral to the ICC as a “halfway measure from the humanitarian military intervention.” If more stringent measures, such as political or economic sanctions or, as a last resort, a military intervention, are urgently needed to halt mass atrocities, the ICC activity cannot be used as an excuse by the international community not to take action.⁴⁷

The stakes are high and, depending on the way of handling various challenges the Court is facing the ramifications will go beyond the institution itself, but will reflect on the international criminal justice more generally.⁴⁸

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⁴⁸ Ginsburg, Tom, “*The Clash of Commitments at the International Criminal Court*,” *Chicago Journal of International Law*, Forthcoming, 18 November 2008, <http://ssrn.com/abstract=1303849> (accessed 15 January 2012)

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