



The Role of the UN Security Council in relation to the International Criminal Court: A Critical Review

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Abstract

The UN Security Council which represents the UN's political body, and the International Criminal Court (ICC), which represents the system's judiciary, are two significant international bodies. According to the ICC's Rome Statute, they are linked by a legal basis. The Security Council's function in relation to the work of the ICC is defined within Chapter VII of the UN Charter under Articles 13 and 16 of the ICC Statute, which deal with the powers to refer a case to the court and to suspend its proceedings. These powers can be considered to be a positive act of referral for the aim of preserving international peace and security; however, it can also be viewed as a negative act that suspends the operations of the court and interferes with the independence of the court. Therefore, the aim of this study was to provide a critical review of the role of the Security Council as an obstacle to the independent work of the ICC. The study found that the lack of assurance in the Rome Statute shielding it from interference increases the Security Council 's authority over the ICC's functioning. The ICC might be viewed as being directly influenced by the Security Council's authority in this instance, losing its impartiality and succumbing to political pressure.

Keywords: UN Security Council, International Criminal Court, Rome Statute, Referral power, Deferment power, Judicial independence.



1. Introduction

The Security Council and the International Criminal Court (ICC) are two high-level bodies that closely coordinate with each other. The Security Council serves as a political institution representing the international community, while the ICC functions as an international judicial entity implementing an international criminal justice system within the parameters set by the Rome Statute. The Rome Statute establishes a legal link between the Security Council and the ICC. Under Articles 13 and 16 of the Rome Statute¹, the Security Council is granted the authority to refer cases to the court and suspend ICC operations through resolution passing. While the ICC's goal is to achieve justice and prosecute criminals, the Security Council focuses on peaceful dispute resolution.

The legal relationship between these entities has been a significant topic of debate during and after the formulation of the Rome Statute. This study aims to highlight the negative impact of the Security Council on the ICC's pursuit of international criminal justice. Specifically, it questions whether the Security Council's authority to refer cases to the ICC and suspend court proceedings adversely affects criminal trials. Referral power from a political body to a judicial body can be seen as positive for international peace, but suspending court operations can interfere negatively with ICC's impartiality and independence. Therefore, this research critically reviews this issue.

Through a meticulous review, this study seeks to clarify the complexities of the Security Council's role concerning the ICC. It starts with an extensive literature review to provide context and explore controversies. Subsequently, it delves into the legal foundation linking the Security Council and ICC, and then goes on to discuss the role of the former vis-à-vis the work of the latter, including the UN Security Council's power to submit cases to the ICC and to postpone investigation or prosecution. Critiques of these powers are examined to inform the study's conclusions. By shedding light on these dynamics, this research contributes to a nuanced understanding of the intricate relationship between the Security Council and ICC, crucial for advancing international criminal justice and upholding global rule of law.

2. Research Methodology

This study employs a qualitative approach, relying on secondary sources and legal texts, supplemented by the critical method, to collect data and derive conclusions. It begins with an extensive review of existing literature, encompassing scholarly articles, legal analyses, and international reports pertaining to the legal relationship between

¹ The Rome Statute is an effort that focuses on the advocacy of human rights and the promotion of international justice to ensure world peace. The treaty was adopted at the United Nations Diplomatic Conference of Plenipotentiaries held in Rome, Italy on 17th, 1998, but only came into force on 1st, 2002, with over 120 countries being party to the treaty. The Rome Statute consists of 13 parts and 128 Articles; the Preamble is based on the recognition of the atrocities that humans face that threaten the peace and security of the world at large, and the treaty serves as a means of resolution of these atrocities. See further Amulya Bhatia, *The Rome Statute*, *iPleaders*, 11 August 2022. <https://blog.ipleaders.in/the-rome-statute/> .



Security Council and ICC, with a specific focus on Articles 13 and 16 of the Rome Statute. Through thematic analysis, key arguments, criticisms, and perspectives are identified and synthesized. The critical evaluation of the legal framework encompasses core concepts such as complementarity, judicial independence, and international peace and security. Findings from the literature review are analyzed to uncover common themes and inform evidence-based recommendations for legal reforms aimed at safeguarding the ICC's independence and efficacy. By adopting this methodology, the study aims to deepen understanding of Security Council -ICC dynamics and contribute to scholarly discourse on international criminal justice.

3. Literature review

Before going into the depths of this topic, it is important to conduct a literature review to identify existing gaps and form a conceptual framework on which the current study is based in explaining the legal aspects of the subject.

In examining the relationship between the ICC and the Security Council both Alkhseilat et al, and Yavaş offer valuable insights into the complexities of international justice mechanisms. Alkhseilat et al, highlight the significance of Security Council referrals to the ICC as a crucial avenue for addressing gross human rights violations and promoting global accountability. However, they caution against potential politicization and abuse of power, particularly concerning the Security Council 's authority to refer cases and postpone ICC proceedings under the Rome Statute. This critical analysis underscores the need for clarity, transparency, and accountability in the ICC- Security Council relationship to uphold international law and protect human rights (Alkhseilat et al.,). Similarly, Yavaş delves into the intricate mechanisms through which the ICC and the Security Council operate, emphasizing the ICC's jurisdiction over genocide, crimes against humanity, war crimes, and aggression. Yavaş scrutinizes the potential politicization of Security Council referrals and the theoretical implications of the Security Council 's deferral powers, advocating for a recalibration of the ICC- Security Council relationship to safeguard the ICC's autonomy and uphold international law principles. By providing a comprehensive examination of the triggering mechanisms for ICC investigations and offering a nuanced critique of the Security Council 's role, Yavaş contributes to ongoing debates within the field of international law and human rights (Yavaş, 2015). Together, these analyses enrich the discourse on international justice, offering valuable insights into the intersection of legal frameworks and geopolitical realities. Both studies underscore the need for careful consideration of the balance between national jurisdictions and international accountability, as well as the imperative of safeguarding the independence and integrity of judicial processes on the global stage. Therefore, these studies can support the current study, which investigates this issue in depth and presents necessary solutions in this regard.

In his article, Bara highlighted the extent of the impact of the powers given to the Security Council on the ICC under the texts of UN Charter and the Rome Statute. He concluded that the Security Council, through referrals, would influence the ICC to extend or delay its jurisdiction, which would not prevent the imposition of sanctions, which was contrary to the rule of consensus in international treaties. Nonetheless, the



UN Security Council's authorities of referral do not affect the independence of the ICC as a jurisdictional institution because the ICC is solely responsible to decide whether or not to accept the cases before it (Bara, 2014). This article discusses the potential impact of Security Council powers on the jurisdiction of the ICC, suggesting that it could result in extensions or delays contrary to the principle of consensus in international treaties. However, it lacks specific examples to support this argument. It could be strengthened by citing cases like the referrals of Sudan and Libya to the ICC, which were criticized for possible political motivations rather than genuine pursuit of justice (Shamsi, 2016). The article's author asserts that the ICC's independence as a jurisdictional institution remains intact despite Security Council referrals, as the ICC retains the discretion to accept or reject cases. While this assertion holds true in principle, the article could be strengthened by acknowledging challenges to the ICC's independence, such as accusations of bias or external pressure influencing its decisions. For example, it can be criticized that the ICC may feel compelled to prioritize cases referred by the Security Council to maintain its legitimacy. Therefore, these challenges warrant careful consideration to ensure a comprehensive understanding of the ICC's jurisdictional integrity

Similar to other previous studies, Bojurav outlined the Security Council's referral powers to the ICC. He mentioned that the Security Council is one of the most significant organs of the UN, as it represents the preservation of international peace and security within the framework of Chapter VII of the UN Charter (UN Charter, Art.39 - 51, 1945). However, unlike other authors, he criticized the role of the Security Council's decision to send a case to the ICC. He asserted that after the approval of all nine members, including the votes of all permanent members, the case will be sent to court. These decisions will be made in the interests of the permanent members, which means that crimes will be referred to the court without the consent of the other parties. He therefore concluded that the Security Council should refrain from political interference in the judiciary. Bojurav's assessment acknowledges the Security Council's influential role within the UN charter but criticizes its potential political interference in the ICC's jurisdiction. He argues that decisions to refer cases to the ICC may be influenced by the interests of permanent members, a point I will delve into in the upcoming sections of the paper, potentially marginalizing other involved parties. The author emphasizes the importance of maintaining judicial independence and calls for the Security Council to refrain from political interference in the court's proceedings. This critique highlights the need for impartiality and transparency in Security Council referrals to the ICC, ensuring fair and just outcomes.

Meanwhile, Salim's study concentrated on how the ICC and the Security Council relate to one other in terms of referral and procedural postponement. He opined that the nature of their relationship in terms of postponing proceedings is an unequal one, where the Security Council acts as a court watchdog, preventing the court from trying perpetrators of crimes and imposing appropriate punishments. However, the nature of the relationship between them in the context of referral is equal in terms of legal status and complementarity in competencies to achieve one of the key goals of the UN, which is the preservation of international peace and security (Salim, 2022). This study provides



valuable insights into the ICC-UN Security Council relationship. It identifies an imbalance in their interaction regarding procedural postponement, with the Security Council potentially hindering justice. Nevertheless, he notes a more equal footing in terms of referral, aligned with the UN's peace and security objectives. This analysis resonates with instances like the referral of the situation in Syria, where political considerations impacted the ICC's ability to act decisively (UNSC, Res 111407, 2014). On the other hand, collaborations, such as the referral of the situation in Mali, showcase potential for mutual goals in achieving accountability (UNSC, Res 2640, 2022). Therefore, this study can pave the way for further research, which presents both the complexities and opportunities for cooperation between the ICC and the Security Council.

Correspondingly, some recent studies conducted by several authors also focused on the role of the UN Security Council in relation to the ICC. Mohamed and Sabah in their study noted that the Security Council's referral of a case to the ICC undermines the rule of consent the complementarity principle between the ICC and national courts, as well as the ICC's jurisdiction over non-member states. Yet, this action of the Security Council can be considered as a positive step that will expand the competence of the court to states that are not members of the Rome Statute. However, they disagree with giving the Security Council the power to adjourn proceedings, viewing it as a dangerous precedent in the history of international criminal justice, given that it reinforces the subordination of a judicial body to a political body. This is considered interference in the work of the court and affects its independence (Mohamed & Sabah, 2022). The study presents a comprehensive analysis of Security Council's role in relation to the ICC, highlighting both positive and negative aspects. Mohamed and Sabah's study raises novel ideas regarding the implications of Security Council referrals on the ICC's jurisdiction and independence. For example, they argue that while Security Council referrals may expand the ICC's competence to non-member states, it also undermines the principle of complementarity and the consent of involved parties. This notion challenges traditional understandings of the ICC's jurisdictional boundaries and highlights the complexities of international justice. Additionally, Mohamed and Sabah's disagreement with granting the Security Council power to adjourn proceedings presents a significant novelty idea. They assert that such authority sets a dangerous precedent in international criminal justice, blurring the lines between judicial and political bodies and potentially compromising the court's independence. This critique offers fresh insights into the delicate balance between legal and political considerations within the international justice system. Therefore, the authors' study provides new perspectives on the discourse of the relationship between the ICC and the UN Security Council, emphasizing the need to examine the intersection of legal principles and political dynamics in international criminal justice that this paper emphasizes.

Differing from previous studies, Aregawi's research provides a comprehensive examination of the relationship between the Security Council and the ICC, focusing specifically on the selective utilization of the Security Council 's referral authority to the ICC. Through an in-depth analysis of cases such as Darfur, Libya, and Burma, Aregawi highlights the complexities and challenges inherent in Security Council referrals,



emphasizing the need for objective criteria and credible processes to determine potential referrals. The study advocates for increased cooperation between the Security Council and the ICC to enhance the effectiveness of referrals and strengthen international justice mechanisms (Aregawi, 2017). This study effectively highlights the challenges and complexities inherent in Security Council referrals, such as concerns about politicization and inconsistencies in decision-making, as illustrated by the cases of Darfur, Libya, and notably, Burma.

Similarly, Lugulu's research delves into the relationship between the ICC and the Security Council, examining the exercise of referrals and deferrals of situations to the Court. Lugulu highlights discrepancies between the intended interaction outlined in the Rome Statute and the actual practices of the Security Council, emphasizing the adverse effects of inconsistent referrals and deferrals on the credibility and legitimacy of the ICC. Like Aregawi's research, Lugulu underscores the importance of cooperation and enforcement for successful referrals, advocating for clearer obligations on states to cooperate with the Court and the imposition of sanctions on non-compliant states. However, Lugulu's study does not explicitly explore the situations in Burma or delve into the nuances of Security Council referrals as deeply as Aregawi's research (Lugulu, 2014) Both Aregawi and Lugulu emphasize the need for increased cooperation between the Security Council and the ICC to enhance the effectiveness of referrals. They also highlight concerns about politicization and inconsistencies in decision-making regarding Security Council referrals. However, they differ in their depth of analysis, with Aregawi providing a more comprehensive examination of specific cases and advocating for the establishment of objective criteria for referrals. Overall, both studies make valuable contributions to this study's literature on the ICC- Security Council relationship, albeit with differences in focus and depth of analysis.

Ibrahim in his paper critically evaluates the unique international relationship between the Security Council and ICC, with a focus on Security Council referrals and deferrals under the Rome Statute. It scrutinizes the Council's pivotal role in advancing international peace and justice through its discretionary powers under Chapter VII of the UN Charter. By utilizing these powers, the Council empowers the ICC to address international crimes, extending its jurisdiction to non-party states and reinforcing accountability mechanisms. Despite commendable efforts, challenges such as political influence, selectivity in referrals, and practical limitations arise, prompting scrutiny. However, the collaboration between the Security Council and the ICC remains vital, contributing significantly to the realm of international law and justice by fostering accountability, peace, and security (Ibrahim, 2021). The study by Ibrahim has been instrumental in examining the relationship between the Security Council and the ICC within a legal framework, highlighting potential inequities in the ICC's operations and advocating for a broader scope of analysis. What sets our study apart from Ibrahim's work is its in-depth exploration of the debate surrounding the allocation of referral and postponement authority to the UN Security Council. While Ibrahim primarily focuses on the specific legal dynamics between the Security Council and the ICC, this study extends the discussion and expands it deeply by critically evaluating the implications and controversies surrounding the exercise of Security Council powers among jurists



and experts. Specifically, it scrutinizes the contentious debate over whether the Security Council should be empowered to refer situations to the ICC and defer investigations or prosecutions, or whether a monitoring mechanism is necessary for that purpose. Through a comprehensive critique of the referral and postponement powers delegated to the Security Council, the study illuminates both the positive and negative aspects of the Council's involvement with the ICC. This analysis aims to offer a fresh perspective on the complex interactions between the Security Council and the ICC, thereby contributing to the discourse on international law and justice.

A meticulous examination of the aforementioned studies reveals that the literature review provides a comprehensive overview of existing research on the relationship between the ICC and the Security Council. Though, these studies illuminate various aspects of this relationship, including the ICC's jurisdiction, Security Council referrals, and potential challenges such as politicization and selective utilization, they collectively expose a critical gap. These previous studies have touched upon the legal and conceptual frameworks governing ICC- Security Council ties but there remains a significant dearth of comprehensive analysis regarding the critical review of the Security Council 's role in relation to the ICC. The distinctive contribution of this paper lies in its emphasis on conducting a thorough examination of the Security Council 's role vis-à-vis the ICC, particularly focusing on areas requiring reform. While existing literature acknowledges the complexities and challenges in this relationship, this study seeks to delve deeper into identifying specific areas of concern based on the experts and jurist's opinions, such as potential politicization, inconsistency in referrals and deferrals, and the implications of Security Council powers on the ICC's jurisdictional integrity. By critically evaluating the allocation of referral and postponement authority to the Security Council, this study aims to fill the gap in the literature by offering fresh perspectives on the intricate dynamics between these two institutions. Through a nuanced analysis of legal principles, this study seeks to contribute to a comprehensive understanding of international law and justice, paving the way for necessary and thorough reforms and improvements distinct from previous studies on the ICC- Security Council relationship.

4. Analyzing the Dynamic Legal Nexus Between the Security Council and ICC: Implications, Criticisms, and Challenges

The relationship between the Security Council and the ICC is a complex interplay of legal frameworks, authority dynamics, and geopolitical considerations. This intricate interaction, governed by Chapter VII of the UN Charter and the Rome Statute, delineates the scope of the Security Council 's power in maintaining global peace and security while balancing the ICC's mandate to address impunity for international crimes. In this exploration, this section explores into the nuanced nuances of this relationship, examining key legal provisions, challenges to sovereignty, and the delicate balance between justice and geopolitical interests. Through a critical analysis of Articles 39, 41, and 42 of the UN Charter, alongside Articles 13(2) and 16 of the Rome Statute, the section navigates the complexities of authority, sovereignty, and impartiality shaping the Security Council -ICC dynamic.



The Security Council 's power in regard to the ICC can be defined in the context of maintaining international peace and security, as outlined in Chapter VII of the UN Charter, particularly in Articles 39, 41, and 42. Article 39 states “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Although this article grants the Security Council the absolute authority to determine threats to international peace and security, which can include situations that fall under the jurisdiction of the ICC, this power can be subject to political considerations and selective enforcement, leading to instances where the Council fails to act decisively in situations where accountability for international crimes is warranted. For instance, in the case of the conflict in Myanmar's Rakhine State, where the Rohingya population has faced widespread persecution, including allegations of genocide and ethnic cleansing, the Security Council has struggled to refer the situation to the ICC (“Myanmar: UN Security Council,” 2022). Despite compelling evidence of atrocities committed by the military and other armed groups, divisions among Council members, particularly concerning diplomatic relations and strategic interests with Myanmar, have hindered efforts to hold perpetrators accountable through the ICC.

Article 41 states “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” Article 41 allows the Security Council to employ measures short of military force to enforce its decisions, including economic sanctions and diplomatic measures. While these non-force measures can be valuable tools in addressing international conflicts, their effectiveness in the context of ICC-related situations can be limited. For instance, economic sanctions imposed by the Security Council in response to human rights violations may have little impact on perpetrators' behavior or the broader dynamics of conflict, particularly if key actors remain unaffected or find alternative sources of support.

Article 42 states “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.” However, this Article that grants authority to the Security Council to authorize military force in ICC-related situations, such as War crimes, in order to protect international peace and security, raises fundamental questions about the balance of power and accountability within the international system. The Security Council's ability to unilaterally decide on the use of military force, particularly in cases involving alleged perpetrators of international crimes, lacks sufficient checks and balances and may undermine the principles of international justice and the rule of law. This unchecked authority allows the Security Council to potentially bypass legal mechanisms, such as the ICC, and impose its will through coercive measures that may not always be in line with the principles of justice,



proportionality, and respect for human rights. While the Article provides a legal framework for the Security Council's intervention in ICC-related situations, its unchecked authority and potential for abuse pose significant challenges to the principles of international justice and the effectiveness of the ICC's mandate.

Consequently, in the event of any danger to international peace and security, which is also a crime within the framework of those stated in Article 5(1) of the Rome Statute, including "the crime of genocide, crimes against humanity, war crimes, and the crime of aggression," the Security Council shall intervene and resolve the matter according to the provisions of the UN Charter. In another word, if the nature of the threat corresponds to the crimes emphasized by the ICC statute, a relationship will be established between the council and the court.

Article 24 of the UN Charter assigns the responsibility of preserving international peace and security to the Security Council. When the Security Council refers a case to the ICC, member states and countries are bound by the court's rulings under Articles 25 and 2(6) of the UN Charter. These articles reinforce the council's legal authority over its decisions, which are binding on all UN members and need ratification. However, these articles could provide member nations a strong legal incentive to collaborate with the ICC in implementing its decisions when requested by the UN Security Council (Al-Jawhar, 2011). Although, Article 24 of the UN Charter assigns the Security Council the responsibility of preserving international peace and security, the legal interpretation and exercise of this authority, particularly in referrals to the ICC under Articles 25 and 2(6) of the UN Charter, can face significant criticism. One legal criticism challenging the Council's authority in referring cases to the ICC revolves around the principle of sovereignty. It can be said that such referrals may infringe upon the sovereignty of states, as they effectively subject them to the jurisdiction of an external judicial body without their consent. This raises concerns about the potential erosion of state sovereignty and the imposition of external legal standards on sovereign states. Additionally, it can be criticized that when the Security Council refers cases to the ICC, it might worsen existing conflicts and impede efforts to achieve peace and reconciliation. This is because by bypassing domestic legal processes and initiating international criminal proceedings, Security Council referrals can alienate key stakeholders involved in the conflict. Instead of encouraging cooperation and dialogue among conflicting parties, ICC referrals may deepen mistrust and resentment, making it harder to reach peaceful resolutions. Therefore, a more balanced and nuanced approach that addresses impunity while also promoting dialogue, reconciliation, and continuous peace in conflict-affected areas, in order to maintain world peace and security, is necessary.

However, the Security Council members may refer cases to the court in their own interest as mentioned earlier, but under Article 27(2) of the UN Charter, the court may not be subject to the Security Council's decision unless nine of its members approve. Whereas Article 27(2) of the UN Charter serves to safeguard the independence and impartiality of the ICC from undue influence by the Security Council, its implementation can face criticism for its potential to impede the Court's ability to address impunity effectively. For example, in the case of the Syrian conflict, Russia, a permanent member of the Security Council, has repeatedly used its veto power to block



resolutions aimed at referring the situation to the ICC for investigation of war crimes and crimes against humanity (UNGA, Res 12517, 2023). Therefore, despite widespread international condemnation of atrocities committed in Syria, the Security Council's inability to overcome veto threats has hindered efforts to ensure accountability and deliver justice to victims.

In terms of the legal relationship established through the Rome Statute, during the discussions held at the Rome Conference, the U.S demanded that the Security Council must have referral authority to the ICC. Although other Security Council permanent members wanted to share the matter with the member states in the court's statutes and prosecutors, the Rome Statute finally accepted the directive to empower the UN Security Council to send cases to the ICC in addition to member states of the statute and the court's prosecutor, provided that it acts within the context of Chapter VII of the UN Charter (Owainat, 2014).

The connection between the ICC and the Security Council is established under Articles 13(2) and 16 of the Rome Statute. Article 13(2) states, "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 clarifies that under Chapter VII of the UN Charter, the Security Council has the authority to recommend a case to the ICC prosecutor if it poses a risk to international peace and security. However, a critical aspect that the Article neglects to discuss is the issue of bias and irregularity in referrals to the ICC by the Security Council. The Security Council's discretion in selecting which situations to refer to the ICC can lead to accusations of bias or double standards in international justice. The Council's swift referral of cases in some regions while hesitating or failing to act in others raises questions about the equitable application of international criminal law. This discrepancy in responses, exemplified by the proactive approach in Afghanistan ("Situation in the Islamic Republic of Afghanistan," 2020) by the ICC Prosecutor contrasted with the lack of referral for Ukraine by the Security Council, highlights potential biases or double standards in international justice (Grzebyk, 2023). The varying responses by the Security Council suggest that it may act promptly in some situations where international crimes are reported, while being reluctant or inactive in others. Such disparities cast doubt on whether international criminal law is being applied consistently and fairly across different regions and situations. This emphasizes the need for a more uniform and principled approach to referrals to ensure justice and accountability on a global scale.

Another notable feature of the ICC- Security Council interaction is the power of deferment given to the latter. The Rome Statute adopted this provision by Article 16, which grants the Security Council the authority to delay the investigation and prosecution by the ICC for any crime that threatens international peace and security. In other words, the Council can suspend the activities of this court by virtue of Article 16, which states, "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.” However, one of the primary concerns is that this power could be manipulated by powerful states to shield themselves or their allies from accountability. For example, a scenario could arise where a member state accused of committing mass atrocities pressures the Security Council to use Article 16 to halt ICC investigations indefinitely. This manipulation of the Court's processes undermines its credibility and erodes trust in its ability to deliver justice impartially. Moreover, the provision raises questions about the balance between the goals of international justice and maintaining international peace and security. While Article 16 aims to prevent conflicts between the interests of the ICC and those of the Security Council, it effectively allows the latter to exert significant control over the former's activities. This control can potentially compromise the Court's ability to fulfill its mandate and uphold the principles of accountability and the rule of law. Therefore, Article 16 has been criticized for creating a significant loophole in the ICC's legal framework, which we will further elaborate on in the following sections. This loophole could potentially be exploited by powerful states to avoid accountability for serious crimes. This undermines the Court's effectiveness and integrity, ultimately hindering its ability to achieve its stated goals of ending impunity and promoting justice on a global scale.

The examination of the legal foundation governing the relationship between the Security Council and the ICC reveals a complex landscape fraught with challenges and opportunities. While the Security Council's authority, as outlined in Chapter VII of the UN Charter, empowers it to address threats to international peace and security, its selective enforcement and potential infringement on state sovereignty raise critical questions about the balance of power and accountability within the international system. Moreover, the dynamics of referrals to the ICC underscore issues of bias and inconsistency, highlighting the need for a more principled approach to ensure justice and accountability on a global scale. Despite the challenges posed by provisions such as Articles 13 and 16 of the Rome Statute, which grant the Security Council the power of referral and deferment, the examination ultimately emphasizes the imperative of upholding the principles of international justice and the rule of law while navigating the complexities of geopolitics and conflict resolution on the world stage.

5. The UN Security Council's Role in the ICC

The Security Council stands at a pivotal junction where international law intersects with international peace and security. One of its significant roles pertains to its engagement with the ICC, where it holds authority over critical decisions regarding the prosecution of individuals for egregious crimes against humanity, war crimes, genocide, and acts of aggression. This discourse delves into the intricate mechanisms governing the Security Council's involvement with the ICC, exploring both the process of referrals and the legal conditions for suspending ICC investigations. By dissecting the nuances of these interactions, this segment aims to unravel the complexities inherent in this relationship and shed light on the diverse perspectives shaping the debate. From delineating the procedural intricacies of referrals to assessing the implications of deferment powers, this exploration navigates through the confluence of international law, political dynamics, and the pursuit of justice on the world platform. Through a comprehensive analysis, the segment endeavors to unveil the underlying principles



guiding the Security Council 's role in facilitating accountability while navigating the delicate balance between justice and the exigencies of international security.

5.1 Understanding the Process and Criteria of Referrals to the ICC

A referral is, idiomatically, a prosecutor's demand to start legal procedures before the ICC for cases involving one or more of the offences specifically mentioned in Article 5 of the ICC Statute, if it seems to the Security Council through evidence. The content of the referral is derived from Article 13(2) of the ICC Statute which provides "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 text is explicit about the matter (referral), highlighting a case where it appears that one or more of the crimes listed in Article 5 of the Rome Statute has been perpetrated. In addition to Article 13, Article 14(2) emphasizes the requirements of a referral, stating "As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation". However, it should be noted that Article 13 relates to cases of exercising jurisdiction, and referral means an incident, and not in the sense of a simple case. It also means a dispute where there is doubt about the extent of the crime; while some believe that the term "crime" was used because it is more accurate than the word "case" in terms of legislative drafting, but it leads to the same meaning and the same content (Al-Adwan, 2016).

It is crucial to emphasize that any referral from the Security Council to the ICC must adhere to specific substantive conditions as states in Article 13,² without which the ICC cannot approve the referral. To begin with, the decision of the UN Security Council regarding a referral must pertain to one of the crimes enumerated in Article 5(1) of the Rome Statute, namely "the crime of genocide, crimes against humanity, war crimes, and the crime of aggression". This provision restricts the Security Council from referring any other offenses to the ICC, thereby confining the court's jurisdiction to these specified crimes.

In addition, the referral of a crime by the Security Council must align with the criteria outlined in Chapter VII of the UN Charter. Article 39 of the UN Charter grants the UN Security Council the power to determine necessary actions to maintain global peace and security in accordance with Articles 41 and 42. These actions may include provisional measures under Article 40³, preventive measures under Article 41, or enforcement

² Article 13 of ICC Statute is relevant to the "Exercise of jurisdiction" , it states "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (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; or(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15."

³ Article 40 of the UN Charter states "In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply



measures under Article 42. Therefore, a referral to the ICC cannot be considered an enforcement measure as it does not involve the use of armed forces, nor can it be viewed as a temporary action since it aims at resolution and reconciliation. This underscores that the Security Council's authority to make referrals to the ICC is constrained by the regulations delineated in the Rome Statute.

The Rome Statute does not explicitly outline the procedure for the Security Council to make referral decisions; however, Article 13(2) of the statute specifically references Part VII of the Charter. This indicates that the voting procedures detailed in Article 27 of the UN Charter must be followed. According to Article 27, procedural decisions by the Security Council require the consent of at least nine out of its fifteen members, without the necessity for a vote from a permanent member. For substantive decisions, a vote from nine members is needed, with at least one being a permanent member. Therefore, when the Security Council decides to refer a case to the ICC, achieving a quorum is essential. Nevertheless, a permanent member could exercise their "right of veto" as per Article 27(1) of the UN Charter to oppose a resolution. In such a scenario, the objection of one permanent member is adequate to block a substantive decision, but it does not impede procedural resolutions by the Security Council.⁴

Lastly, the referral decision must relate to a case that has already occurred. It would be invalid if it relates to a future case that has not yet occurred; for example, if the referral order specifies that the crime occurred during the expected conflict between State (A) and State (B), it could constitute one of the crimes the ICC will have authority over. However, this provision is closely related to the provision requiring a Security Council referral decision to identify a situation that may pose a danger to international peace and security, a violation thereof, or an act of aggression.

In light of the above, the process of referrals to the ICC entails meticulous adherence to substantive conditions outlined in the Rome Statute and the UN Charter. From the requirement to refer cases that have already occurred to the intricate voting procedures of the Security Council, each aspect plays a crucial role in ensuring the legitimacy and effectiveness of referrals to the ICC. By comprehending the criteria, jurisdictional considerations, and procedural requirements involved in referrals, stakeholders can navigate this complex process with clarity and precision, ultimately contributing to upholding global peace, security, and justice through the ICC's mandate.

5.1.1 Assessing Perspectives on Security Council Referral Authority to the ICC

with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.”

⁴ UN Charter, Art. 27. It states “1. Each member of the Security Council shall have one vote. 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”



This section explores the diverse perspectives put forth by law scholars regarding the empowerment of the Security Council to refer cases to the ICC. This debate entails an examination of the potential benefits and risks associated with granting the Security Council such authority. Proponents argue that Council referrals can enhance international justice and accountability, while others caution against potential politicization and limitations on the Court's independence. The section investigates these contrasting viewpoints and considers a middle-ground approach that balances the need for accountability with safeguards to protect the integrity of the Court.

There is a consensus among various law scholars regarding the empowerment of the Security Council to refer cases to the ICC, viewing it as a positive step in enhancing the relationship between the Council and the ICC. Scholars such as Scheffer and Schabas advocate for the Council's referral power, asserting that the Court should be closely associated with the Security Council, aligning with the Council's responsibility for maintaining global peace and security as outlined in the UN Charter (Scheffer, 1999 & Schabas, 2004). Additionally, Professor Dapo Akande, a renowned expert in international law, supports this view, arguing that the Council's authority to refer cases to the ICC is a legitimate exercise of its mandate under the UN Charter. Akande emphasizes the crucial role of the Council in ensuring accountability for international crimes and upholding justice by referring cases to the ICC for prosecution, particularly in situations where national jurisdictions may be inadequate (Akande, 2009). Furthermore, Bara, another law scholar, contends that granting the Security Council this power would obviate the need for establishing separate international criminal tribunals, thereby saving costs and streamlining procedures. This authority also guarantees that individuals who commit international crimes do not evade accountability, especially if their home country or the country where the crime occurred is not a party to the Rome Statute (Bara, 2014). Moreover, Gabriel M. Lentner, an Assistant Professor of International Law, supports empowering the Security Council to refer cases to the ICC. Lentner asserts that such referrals provide a clear legal basis for the ICC's jurisdiction, ensuring accountability for crimes under international law. He underscores the importance of robust justifications for ICC jurisdiction in cases stemming from Security Council referrals, emphasizing clarity and legal coherence. Lentner argues that Security Council referrals are essential for addressing impunity, preventing future atrocities, and promoting global justice, thereby enhancing the effectiveness and legitimacy of international justice efforts (Lentner, 2021). In addition, some add to that; this authority would oblige member states to uphold their duties under Articles 2(6) and 25 of the UN Charter as mentioned earlier i.e., comply with requests to give their cooperation as may be required by the prosecutor, especially in cases of arrest and surrender of offenders who are supposed to have committed crimes. In case they fail to cooperate with the court, they will be responsible under international law and might face international sanctions ("The ICC and the UN Security Council," n.d)

However, the viewpoints of law scholars regarding the Security Council's authority to refer cases to the ICC warrant critical assessment, as they present both opportunities and potential pitfalls. For instance, scholars like Scheffer and Schabas argue for a



symbiotic relationship between the ICC and the Security Council, suggesting that Council referrals enhance the Court's effectiveness. However, an example such as the referral of the situation in Libya by the Security Council to the ICC in 2011 raises concerns about the politicization of justice, given the Council's political dynamics and interests in the region. Similarly, Professor Dapo Akande's support for the Council's authority could be examined in light of instances like the ICC's involvement in Mali, where Council referrals intersected with broader geopolitical considerations, potentially undermining the Court's impartiality (Vinjamuri, 2013). Bara's proposal to forego separate tribunals in favor of Security Council referrals may overlook examples such as the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which addressed atrocities specific to the Balkan conflicts, demonstrating the need for tailored judicial mechanisms. Furthermore, Gabriel M. Lentner's emphasis on legal clarity in Security Council referrals could be analyzed alongside examples like the situation in Syria as noted earlier, where disagreements among Council members hindered unified action, potentially complicating ICC jurisdiction. These scholars therefore offer valuable insights, but their views are not convincing enough to be dependable that the Security Council's authority to refer a case to the ICC can protect the Court's impartiality.

However, there is another line of argument that opposes granting the council the authority to make referrals. Both Tladi and Goldsmith argue that this perspective contends that the Security Council is not permitted to participate in any way in the work of the ICC. They argue that considering the differences and nature of the two bodies, allowing such participation would risk the dominance of a political body over a judiciary. This could lead to constraints on the court's independence, with permanent Security Council members and their allies potentially avoiding accountability for crimes they commit if not brought to court. Furthermore, proponents of this view suggest that empowering the Security Council to refer cases to the ICC not only hinders the imposition of sanctions on criminals but also undermines the court's credibility as an impartial and independent judiciary (Tladi, 2014 & Goldsmith, 2003). Other advocates of this stance, like the law scholar Buzidi, also highlight that the power of referral by the Security Council is not explicitly endorsed in the UN Charter. However, Article 40 of the UN Charter confirms the Security Council's authority to take provisional measures to prevent a situation of conflict from escalating. As previously mentioned, this provision allows the Security Council to take interim actions before resorting to the measures outlined in Article 39 of the UN Charter. Buzidi's perspective raises the question: If the referral of a case to the ICC is considered within the scope of actions permissible under Article 40, how can this action be deemed timely and not impact the legal positions and demands of the parties involved? Additionally, it is noted that the term "disputants" in the mentioned article refers specifically to states and not to individuals (Buzidi, 1970).

While advocates like Scheffer, Schabas, Akande, and Lentner support such empowerment, citing potential benefits for international justice, there are counterarguments that raise significant concerns. Tladi and Goldsmith, for instance, argue against granting the Council referral authority, highlighting the risk of politicization and the potential dominance of political interests over judicial integrity. As



noted earlier, the example of the Security Council's referral of the situation in Darfur to the ICC in 2005 serves as an illustration, where geopolitical considerations may have influenced decision-making, potentially compromising the Court's impartiality. Moreover, Buzudi's criticism of the lack of explicit endorsement for Council referral power in the UN Charter raises fundamental questions about the legal basis and legitimacy of such actions. For instance, considering Article 40 of the UN Charter, which permits temporary actions to prevent conflicts, the timeliness and impartiality of ICC referrals by the Security Council are scrutinized. Buzudi's argument emphasizes the importance of ensuring that Council referrals do not jeopardize the legal positions or rights of individuals involved, especially given that Article 40 primarily addresses disputes between states rather than individuals. These critiques challenge the idea that Security Council referrals to the ICC are unconditionally advantageous, underscoring the necessity for careful consideration of the potential implications on the Court's independence, impartiality, and efficacy in upholding international justice.

In light of the diverse perspectives presented by law scholars regarding the empowerment of the Security Council to refer cases to the ICC, a nuanced approach emerges that acknowledges both potential benefits and risks. Proponents advocate for such empowerment, citing its potential to enhance international justice and accountability. They argue that Council referrals can provide a legal basis for ICC jurisdiction, ensuring accountability for international crimes and addressing impunity. However, other scholars caution against the politicization of justice and potential limitations on the Court's independence. Therefore, a middle-ground approach would involve advocating for Security Council referral authority with robust safeguards in place to protect the Court's impartiality. This approach would require clear criteria and oversight mechanisms to ensure that Council referrals are made judiciously and in accordance with the principles of international law, thereby balancing the potential benefits of enhanced accountability with the imperative of safeguarding the Court's integrity.

5.1.2 Analyzing the Impact of Security Council Referrals on the ICC

Exploring the intricacies of Security Council referrals to the ICC and their impact on international justice is the focus of this section. Through an examination of the process and implications of such referrals, this section seeks to offer a comprehensive understanding of how they shape the ICC's role, jurisdiction, and autonomy. By critically analyzing and exploring key principles such as complementarity, the section also presents the complexities involved in balancing international obligations with national sovereignty in prosecuting perpetrators of international crimes. Ultimately, the goal of the section is to illuminate the challenges and nuances surrounding Security Council referrals and their significance in the global legal landscape.

As mentioned earlier, under Article 16 of the Rome Statute, a referral to the Security Council is considered an indirect request against the perpetrators of international crimes. This does not involve indictments of specific persons, since the council's duty is limited to drawing the ICC's attention to the seriousness of a situation in a state through a decision made by the council, which is left to the ICC to examine and prosecute.



When the prosecutor receives information related to the case contained in the referral decision, such as personal testimonies, statements or reports, he should submit it and verify its seriousness. For that purpose, and considering the data obtained, the prosecution should look for a solid reason to think that the offense is under the ICC's purview. Furthermore, the prosecutor should be fully convinced of the evidence and information obtained as to whether the crime under investigation occurred on the ground or not, and whether the case is admissible under Article 17 of the Rome Statute. Thus, there should be strong reasons to justify the prosecutor's report to take investigation measures that could serve the victims and the interests of justice., in parallel with the seriousness of the crime (ICC Statute, Art. 16., 53(1) & 54(1)). Hence, the prosecutor forms conviction regarding the case and must decide whether to launch an investigation, but if he decides not to open an investigation regarding a case referred to him by the Security Council, the latter may ask him to reconsider such decision ("Office of the Prosecutor," n.d & ICC Statute, Art.53(2)).

This paragraph outlines the responsibilities and considerations of the prosecutor in deciding whether to launch an investigation into a case referred to the ICC. The prosecutor must thoroughly assess the seriousness of the information received and verify its relevance to the ICC's jurisdiction. Additionally, they must be convinced of the evidence's credibility and whether the case is admissible under the Rome Statute. The decision to investigate is crucial, as it serves the victims and the interests of justice. However, it doesn't delve deeply into the complexities and challenges faced in practice. For instance, it doesn't address the potential biases or limitations in gathering evidence, the role of political influences in decision-making, or the practical difficulties in achieving full judicial independence. Additionally, the debate surrounding the extent of the prosecutor's powers reflects broader tensions between sovereignty and international justice, which require nuanced analysis beyond a simple dichotomy of detailed versus limited powers. It can also be criticized, regardless of the importance of international commissions of inquiry and their impact on the work and powers of the prosecutor. On the other hand, the Security Council's authority as granted by the UN Charter and international law would be a strong reason for the prosecutor to be unable to fulfill his or her independent duty and would instead act in the interests of the Security Council, without becoming a legal obstacle. Therefore, it can be argued that the legal status of the prosecutor as an independent body is nothing more than a theoretical statement. Further exploration of these issues would provide a more comprehensive understanding of the complexities involved in prosecuting international crimes.

Apart from the above, another issue is how the referral authority of the Security Council affects the complementarity principle. The complementarity principle is considered one of the most significant principles enshrined in the Rome Statute. It asserts that national courts have inherent jurisdiction in prosecuting and punishing criminals. Nevertheless, the ICC intervenes to prosecute offenders of crimes falling under its jurisdiction when national criminal justice systems are absent or ineffectual, replacing them (Seils, 2016).

The complementarity principle highlights the state's sovereignty that has the inherent competence to suppress crimes, regardless of their domestic or international nature.



Articles 17 and 18 of the Rome Statute address how this system works. According to Article 17(2), the complementarity principle's application must be subject to two basic conditions, including the willingness and ability of the competent State to exercise its jurisdiction based on the measures set out therein. Article 18(1) of the Rome Statute provides for the complementarity principle's application in the case of referral by a Rome Statute member state or by the prosecutor, and does not include referral by the Security Council. These articles shed light on the complementarity principle, a cornerstone of the Rome Statute. They emphasize the sovereignty of states in addressing crimes within their jurisdiction, irrespective of their nature. Article 17 delineates the conditions under which this principle applies, underscoring the importance of a state's willingness and ability to prosecute crimes domestically. Additionally, Article 18 outlines mechanisms for the application of the complementarity principle, facilitating referrals by member states or the prosecutor. While the articles elucidate the complementarity principle, they may overlook certain complexities. For instance, the reliance on states to prosecute crimes domestically assumes their capacity and willingness, which may not always be the case, especially in situations of conflict or political turmoil. Moreover, the exclusion of referrals by the Security Council in Article 18 may limit the ICC's ability to intervene in cases where states fail to uphold their obligations, potentially undermining the principle's effectiveness in ensuring accountability for international crimes. For instance, in Venezuela, there have been widespread allegations of human rights violations, including extrajudicial killings, torture, and political repression. However, the Venezuelan government has shown little willingness to hold perpetrators accountable for these crimes. The country's judicial system is often criticized for lack of independence and effectiveness, further hindering domestic prosecution efforts. As a result, the complementarity principle faces significant challenges in Venezuela, where the state's ability and willingness to address these crimes domestically are in question (Mariano, 2021). In addition, political divisions and diplomatic considerations may impede international efforts to address the situation through mechanisms such as ICC referral. Therefore, this highlights the limitations of relying solely on states to uphold their obligations under the complementarity principle, especially in contexts where domestic institutions are compromised or ineffective.

Fransson, in his study, argues that a Security Council referral would automatically undermine the principle of complementary jurisdiction, potentially depriving the national judiciary of its original capacity to investigate crimes. He contends that such a referral to the ICC prosecutor could hinder national courts from exercising their jurisdiction over the referred case, particularly in non-UN and Rome Statute member nations. (Fransson, 2004). This paragraph offers a critical perspective on the implications of Security Council referrals for complementary jurisdiction, highlighting concerns about national judicial independence. Fransson's thesis raises pertinent questions about the impact on national courts' autonomy in handling cases. This critical assessment underscores the importance of preserving domestic legal sovereignty amidst international interventions. However, it is worth noting that national courts may sometimes prioritize their own interests when considering cases within their jurisdiction,



which could influence the Security Council's decision-making regarding referrals to the ICC.

The situation may extend beyond the fact that legally and in practice, the ICC is not entitled to discard the Security Council's referral if it has completed all investigative, search, and trial procedures. It may not, in practice, declare unacceptability of a circumstance if the Security Council deems it incompetent. The ICC is therefore obliged to look into the case, even if the relevant member state has previously decided to prosecute the perpetrators of the criminal case in accordance with its domestic authority. This is because in such cases, member states are obligated to comply with the Security Council's resolutions under the provisions of Chapter VII and Article 25 of the UN Charter ("Policy on Complementarity and Cooperation," 2023 & Malik, 2014). However, according to the principle of competence under the principle of complementarity, a national judiciary has priority over a case, and the ICC cannot intervene unless the state cannot prevent committers of international crimes within the court's authority from escaping justice and punishment under Article 17(1) of the Rome Statute (ICC Statute, Art.17. Sct 1). While highlighting the ICC's obligation to investigate cases referred by the Security Council, it oversimplifies the complexities of international legal dynamics. For instance, consider a scenario where a member state has initiated domestic proceedings against individuals accused of international crimes, but the Security Council refers the case to the ICC. In such a situation, it fails to address potential conflicts that may arise between the ICC's mandate to investigate and the sovereignty of national legal systems. It lacks depth in exploring how such conflicts could impact the effectiveness of international justice mechanisms and the delicate balance required to navigate competing legal jurisdictions. By incorporating examples like this, a more nuanced critique could be offered, illustrating the intricate challenges faced by the ICC in upholding both international obligations and respecting national legal processes.

In summary, the analysis of Security Council referrals to the ICC reveals intricate dynamics impacting international justice. While these referrals serve as indirect requests against perpetrators of international crimes, their implications for the ICC's jurisdiction and autonomy require careful consideration. The prosecutor's role in assessing referral cases underscores the need to balance legal obligations with the ICC's mandate for impartiality. Moreover, challenges arise concerning the complementarity principle's application, particularly when national judicial systems lack effectiveness or independence. These complexities highlight the delicate balance between international obligations and national sovereignty in prosecuting international crimes. Moving forward, a nuanced understanding of these issues is essential for ensuring the effectiveness and integrity of international justice mechanisms.

5.2 Understanding the Process and Criteria of Deferments to the ICC

The legal foundation for the power of Security Council to suspend an investigation at the ICC is derived directly from the Rome Statute, namely Article 16 of it which provides for that the Security Council may demand a stay of proceedings before the ICC for a period not exceeding twelve months at any stage, and the request must be based on



a council resolution and fall within the framework of Chapter VII of the UN Charter (ICC Statute, Art .16).

The last part of Article 16 adds another indirect legal basis for the mentioned Security Council as it linked it to the UN Charter i.e. Chapter VII of it. However, Chapter VII, which begins with Articles 39 to 51 of the Charter, refers to the actions carried out by the Security Council in situations where there is an assault, breach, or threat to international peace and security (UN Charter, 1945). Therefore, within the framework of Article 16 mentioned earlier, three main conditions must be met when the Security Council requests a stay or deferment of ICC proceedings on a case. To begin, a request to the ICC to defer or suspend an investigation or trial shall be made through a resolution approved by the council. This matter is considered substantive and needs the approval of at least nine council members, including five permanent members, each of whom has the right to veto the resolution. This is so that the Council can take other diplomatic measures to resolve the dispute or situation. In addition, the Council must act based on the Chapter VII of the UN Charter; in other words, it must consider that the investigation or trial in question would proceed on the case and pose a risk to international peace and security. Furthermore, the suspension of the investigation or trial must be for a restricted period of no more than 12 months. However, Article 16 lets the Security Council to extend the application under the same conditions for an unlimited number of passes. Thus, it can be said that repeated and multiple applications for renewal may clearly lead to permanent obstruction of the ICC's exercise of jurisdiction, and eventually, the matter will cause a setback in the course of justice as a whole.

5.2.1 Assessing Perspectives on Security Council Deferment Authority to the ICC

This section explores the multifaceted debate surrounding the allocation of deferment powers to the Security Council within the framework of the ICC. As mentioned earlier, the delegation of referral powers to the Security Council caused differences of opinion among the participants of the Rome Conference. Similarly, giving the Security Council the authority to postpone the ICC's proceedings also caused much controversy among the said participants. Through a comprehensive analysis of various perspectives, this section assesses the implications of granting the Security Council such authority and explore potential challenges and benefits associated with this approach. By examining differing viewpoints, the section aims to illuminate the complexities inherent in this contentious issue and provide a nuanced understanding of the debate.

Proponents of the Security Council being given such deferment powers believe that the conservation of international peace needs the attainment of international justice, but the latter may sometimes contradict the demand for peaceful settlement of conflicts; therefore, the need to balance them must be included in the Rome Statute. Article 16 of the Rome Statute is an exercise of the council's powers as already conferred by the UN Charter, in particular Chapter VII which gives the council broad powers (Fremuth & Stavrou, 2022 & El Zeidy, 2002) . In his study, Qadir criticized Article 16 for being vaguely worded. It states that any deferral in investigations and prosecutions must be submitted to the ICC in the form of a request. The ambiguity lies in whether this request



is a standard application to the court by the Security Council President or a decision made by the Security Council under Chapter VII. Furthermore, it is unclear whether this decision pertains to procedural issues or substantive matters requiring approval from the Council's permanent members. The question arises: should the application be directed to the prosecutor or the pre-trial chamber? Furthermore, when does the effective date of an application for suspension of investigation and prosecution proceedings commence? Is it from the date of filing the application or from the date of the decision? (Qadir, 2012). Qadir's critique of Article 16 for its vague wording sheds light on the ambiguity surrounding the submission of deferrals to the ICC. This critical analysis therefore highlights the need for clarity in international legal processes, emphasizing the importance of precise language to avoid misinterpretation and ensure effective implementation.

Moreover, Al-Jawhar, who advocates for granting deferment powers to the Security Council, contends that Article 16 aims to mitigate arbitrary complaints brought under Article 13(2) of the Rome Statute, which could disrupt international peace and security. This situation arises when one party presents misleading evidence to the court, resulting in an unfair decision and potentially prompting the aggrieved state to seek retribution outside the ICC's framework, thus escalating tensions (Al-Jawhar, 2011). However, Al-Jawhar's argument raises concerns about potential misuse and its impact on international peace and security. Entrusting such powers to a political body like the Security Council introduces complexities that could compromise the impartiality and integrity of the legal process. For instance, political considerations may lead to selective application of deferment, favoring certain states and undermining the court's mandate of delivering impartial justice. This scenario could erode trust in the international legal framework, weakening its ability to uphold justice and maintain global peace.

Proponents of this direction further justify giving the Security Council the authority to suspend proceedings, arguing that this power is nothing more than affirming the council's jurisdiction over the principal outcomes of maintaining international peace and security, and that this authority only allows the council to have priority suspension of proceedings at the ICC if the case is considered to relate to a pending issue before the Security Council. Nevertheless, giving the Security Council this power grants it the opportunity to deal with the issues laid down in the UN Charter by peaceful means, so that recourse to the courts is not a primary solution, but an alternative in case the council's efforts fail. Therefore, it is claimed that this power is not absolute, but is limited by a number of constraints that restrict any adverse effects that may flow from it (Ali & Abdul Qadir, 2021). The argument for granting the Security Council the authority to suspend ICC proceedings contends that it reinforces the council's role in maintaining global peace and security. However, it lacks specific examples to substantiate this claim, diminishing its persuasiveness. For instance, the Security Council's involvement in the case of Sudanese President Omar al-Bashir illustrates the potential risks of politicization. In this instance, the Security Council's referral of the situation in Darfur to the ICC faced criticism for being influenced by geopolitical considerations, leading to accusations of bias and interference in the court's independence (Duflos, 2020). Furthermore, while the justification suggests that this



power allows for peaceful resolution of conflicts, it overlooks concerns about potential limitations on judicial independence and the risk of abuse by political actors. Strengthening the argument would necessitate providing concrete examples and addressing potential drawbacks to offer a more balanced assessment of the implications of granting the Security Council such authority.

On the other hand, the majority of the participants in the Rome Conference opposed the Security Council's power to suspend measures, arguing that it may be used as a tool for protection the citizens of Security Council permanent members from prosecution before the ICC. This would undermine the main purpose of establishing the ICC, as it would allow the Security Council to cover up crimes under the pretext of maintaining international peace and security, and thus the perpetrators could not be punished. Furthermore, giving the Security Council the power to suspend the procedures and investigations of the court without time limit would perpetually disrupt its work and hamper the conduct of trials. This uphold continue the subordination of the ICC to the Security Council and make it a mere institution that can be controlled by the Security Council, thus politicizing its role (Moss, 2012). This perspective, unlike the previous one, opposed the Security Council's authority to delay proceedings, contending that this power could be abused to shield citizens of Security Council permanent members from prosecution at the ICC, as mentioned earlier. Consequently, it undermines the accountability function of the ICC, compromising its independence.

Apart from the above two directions, Zaher, in his book, argues for the Security Council to have supervisory power to propose postponement rather than intervene directly, as outlined in Article 16 of the Rome Statute. Consequently, the Security Council should refrain from utilizing Article 16 of the ICC statute to completely paralyze or disable the Court's functions, as this Article grants the council significant authority to intervene in the court's affairs. Advocates of this approach believe that the framers of Article 16 at the Rome Conference intended to facilitate negotiations for the peaceful resolution of conflicts. Therefore, the Security Council should not request a postponement of investigations or prosecutions if it hinders progress in negotiations for a nonviolent resolution of the conflict. Moreover, the preamble and provisions of the Rome Statute affirm the ICC's independent status as a body separate from any other organization (Zaher, 2012).

In my opinion, this direction is a middle way that strikes a balance between the two previous standpoints, the former fully supporting the Security Council's authority to delay the court's proceedings, and the latter strongly opposing it. This moderate direction gives the council the power to delay court proceedings while monitoring the use of this power. Therefore, supporters of this direction believe that Article 16 of the ICC Statute is nothing but an arrogant attempt by the Security Council 's permanent members to overcome the influence and independence of the ICC.

5.2.2 Analyzing the Impact of Security Council Deferment on the ICC

It is evident that Article 16 of the Rome Statute confers on the Security Council extensive powers to suspend functions of investigation and prosecution of the ICC, as well as renewal of suspension period. Although the participating countries in the Rome Conference tried to limit the effects of this power by proposing not to renew the



moratorium or to renew it only temporarily, these proposals were rejected. The text was issued on this power conferred on the council, but the justifications offered in respect of Article 16 are inadequate to dispel the sharp criticisms leveled against it, as renewal only temporarily constitutes a statutory restriction on the ICC's exercise of its authority; whenever there are political circumstances surrounding a probe or investigation conducted by the prosecutor, the Security Council may intervene and stop the probe or investigation based on Article 16 and Chapter VII of the UN Charter (UNGA, Res A/58/874, 2004).

The Security Council's authority to delay court proceedings has faced criticism, with arguments suggesting that Article 16 grants the Council unchecked powers without sufficient constraints. The text's reference to the commencement of proceedings implies that the Council can seek deferment at any phase of a case, regardless of whether the court has initiated its functions or crucial investigative steps are underway, as mentioned in the process of referral (ICC, Art, 16). However, the Security Council's application to postpone the court's investigation will result in the ineffectiveness of the evidence and the loss of the necessary proof of the crime, such as the remains of the crime and witnesses who cannot appear before the court. Therefore, these will have a negative impact on the proper conduct of the investigation process, which is a crucial part of proving the crime.

Another criticism of the Security Council's power to delay the work of the ICC is that it affects the ICC's ability to achieve international justice, because suspending a secret trial for twelve months guarantees a loss of crime rates, loss of victims and witnesses in the form of intimidation to stop them from testifying, or may have a negative impact on their memory, they forget and cannot give detailed testimonies, and all of this makes it difficult to prosecute the committers of international crimes(ICC, Art, 16). The Security Council's resolution to postpone a case may come after the arrest of the suspects, so that in this situation many questions will arise. What is the fate of the accused whose freedom was restricted? Will he be released or remain suspended? The ICC certainly still has the mandate to release the accused, but it is not the job of the court to release those accused of committing the most heinous international crimes.

It should also be noted that the Rome Statute does not contain any clauses giving the prosecution the power to retain evidence during the deferment, which would result in their loss if the deferment is lifted. Another criticism of Article 16 is that the major powers, serving as permanent members of the Security Council, are seen as the driving force behind this ability to delay the court's proceedings. In such situations, these member states may act in self-interest to shield members of their military forces engaged in peacekeeping operations from prosecution. This concern was evident in 2002 when the Security Council passed a resolution urging the ICC not to initiate any judicial proceedings against UN peacekeeping forces (UNSC, Res1487, 2003).

Considering the above, it is obvious that the Security Council's authority to delay ICC proceedings under Article 16 of the Rome Statute, akin to the referral process, yields more negative than positive outcomes. This hinders the ICC's independence in effectively fulfilling its mandate to prevent international crimes and prosecute offenders.

6. Conclusion

In conclusion, this study has shed light on the intricate relationship between the Security Council and the ICC, and the implications of their respective powers within the framework of the UN Charter and the Rome Statute. While the Security Council operates as a political institution, tasked with maintaining global peace and security, the ICC functions as a judicial body with the mandate to prosecute perpetrators of



international crimes. However, these two entities are bound together by legal principles outlined in international law.

The analysis in this study has revealed that the Security Council's authority over the ICC is primarily defined by Articles 13 and 16 of the Rome Statute. Article 13 grants the Security Council the power to refer any case to the ICC, regardless of the state's membership status in the Rome Statute. Similarly, Article 16 provides the Council with the authority to suspend ICC proceedings at any stage. However, criticisms surrounding these powers have been identified, particularly regarding their potential interference with the ICC's independence and the principle of complementarity.

The power of referral granted to the Security Council undermines the ICC's legal independence, as it allows the Council to influence the initiation of investigations by the prosecutor. Additionally, it hampers the principle of complementarity by preventing national judiciaries from exercising jurisdiction over cases referred by the Security Council. Furthermore, the authority to suspend proceedings under Article 16, especially in the hands of the Security Council's permanent members, poses a significant risk of politicizing the ICC's role and compromising its independence.

To safeguard the ICC's independence, it is recommended that amendments be made to Articles 13 and 16 of the Rome Statute. Firstly, Article 13 should be amended to limit the powers of both the Security Council and the prosecutor, ensuring that each case undergoes scrutiny by an independent committee of judges before referral to the ICC. Secondly, Article 16 should be revised to impose stricter conditions on the Security Council's power to suspend court proceedings, including limitations on the renewal of suspension periods. At a minimum, the Security Council should not be allowed to unilaterally issue resolutions to postpone ICC proceedings.

In light of the study's findings, it is advisable to shift the relationship between the Security Council and the ICC from a legal connection to one of cooperation and integration. The current legal provisions have granted the Security Council excessive intervention rights in ICC affairs, threatening the Court's independence. By fostering a collaborative relationship based on mutual respect and cooperation, rather than legal obligations, the ICC can better fulfill its mandate to uphold justice and accountability for international crimes.

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رۆلی ئه نجومه نی ئاسایشی نه ته وه یه کگرتوووه کان په یوه ست به دادگای تاوانی ئیوده وه تی: پینداچوونه وه یه کی په خنه گرانه



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پوخته

ئهنجومه نی ئاسایشی نهتهوه یه کگرتوووه کان که نوینه رایه تی ده زگای سیاسی نهتهوه یه کگرتوووه کان دهکات، و دادگای تاوانی نیوده وه لته تی (ICC) که نوینه رایه تی سیسته می دادوه ری دهکات، دوو ده زگای نیوده وه لته تی گرنکن. به پی پی په پره وی ناوخوای رومای دادگای تاوانی نیوده وه لته تی، به بنه مایه کی یاسایی به یه که وه گریدراون. ئه رکی ئهنجومه نی ئاسایش په یوه ست به کارهکانی دادگای تاوانی نیوده وه لته تی له چوارچیه وی به شی حه وته می جارنامه ی نهتهوه یه کگرتوووه کان به پی پی مادهکانی ۱۳ و ۱۶ په پره وی ناوخوای دادگاکه که باس له دهسه لاتنهکانی رهوانه کردنی دوسیه یه ک بو دادگا و پاگرتنی دانیشهتهکانی دادگا دهکات، پیناسه کراوه. ئه م دهسه لاتانه دهتوانریت به کرده وه یه کی ئه رینی بو رهوانه کردن به ئامانجی پاراستنی ئاشتی و ئاسایشی نیوده وه لته تی هه ژمار بکریت؛ به لام دهتوانریت وه ک کرده وه یه کی نه رینیش سهیر بکریت که کارهکانی دادگا راده گریت و دهستوهردان له سه ربه خوی دادگا دهکات. بو یه ئامانجی ئه م تووژینه وه یه بریتی بوو له پیداوونه وه یه کی رهخنه گرانه له رولی ئهنجومه نی ئاسایش وه ک به ربه ستیک له به رده م کاری سه ربه خوی دادگای تاوانی نیوده وه لته تی. له تووژینه وه که دا ده رکه وتوووه، به هوی نه بوونی گه رهنتی پاراستنی له په پره وی روما له دهستوهردان، دهسه لاتنی ئهنجومه نی ئاسایش به سه ر کارهکانی دادگای تاوانی نیوده وه لته تی، زیاتر دهکات. په نگه دادگای تاوانی نیوده وه لته تی له دوخیکی وادا وه ک ئه وه سهیر بکریت که راسته وخو له ژیر کاریگه ری دهسه لاتنی ئهنجومه نی ئاسایشدا بیت و بیلایه نی خوی له دهست بدات و ملکه چی فشاری سیاسی ده بیت.

وشه سه ره تاییه کان: ئهنجومه نی ئاسایشی نهتهوه یه کگرتوووه کان، دادگای تاوانی نیوده وه لته تی، په پره وی روما، دهسه لاتنی رهوانه کردن، دهسه لاتنی دواخستن، سه ربه خوی دادوه ری.



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ملخص

إن مجلس الأمن التابع للأمم المتحدة الذي يمثل الهيئة السياسية للأمم المتحدة، والمحكمة الجنائية الدولية (ICC)، التي تمثل السلطة القضائية للنظام، هما هيئتان دوليتان مهمتان. ووفقاً لنظام روما الأساسي للمحكمة الجنائية الدولية، فإنهما مرتبطتان بأساس قانوني. يتم تحديد وظيفة مجلس الأمن فيما يتعلق بعمل المحكمة الجنائية الدولية في الفصل السابع من ميثاق الأمم المتحدة بموجب المادتين 13 و16 من النظام الأساسي للمحكمة الجنائية الدولية، اللذين يتناولان صلاحيات إحالة قضية إلى المحكمة وتعليق إجراءاتها. ويمكن اعتبار هذه الصلاحيات بمثابة إحالة إيجابية بهدف الحفاظ على السلم والأمن الدوليين؛ ومع ذلك، يمكن أيضاً اعتباره عملاً سلبياً يوقف عمل المحكمة ويتعارض مع استقلالها. ولذلك، كان الهدف من هذه الدراسة هو تقديم مراجعة نقدية لدور مجلس الأمن كعائق أمام العمل المستقل للمحكمة الجنائية الدولية. وقد توصلت الدراسة إلى أن افتقار نظام روما الأساسي إلى الضمانات التي تحميه من التدخل يزيد من سلطة مجلس الأمن على عمل المحكمة الجنائية الدولية. وقد يُنظر إلى المحكمة الجنائية الدولية على أنها متأثرة بشكل مباشر بسلطة مجلس الأمن المتحدة في هذه الحالة، مما يجعلها تفقد حيادها وتستسلم للضغوط السياسية.

الكلمات المفتاحية: مجلس الأمن التابع للأمم المتحدة، المحكمة الجنائية الدولية، نظام روما الأساسي، سلطة الإحالة، سلطة التأجيل، استقلال القضاء.