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The Authority of the United Nations Security Council in Activating and Limiting the Specialized Jurisdiction of the International Criminal Court

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Abstract

The United Nations Security Council plays a leading role in maintaining international peace and security. This role is complemented by the activities of the International Criminal Court, an entity independent of the United Nations, which prosecutes perpetrators of international crimes. The international community has raised the alarm, finding itself in a race against time to address various crimes. Although the International Criminal Court has made significant efforts in this area, it still requires the establishment of international cooperation. In support of these efforts, the UN Security Council assists by referring serious crimes that are within the jurisdiction of the Court.

Keywords: Security Council, International Criminal Court, referral, crimes, deferment.

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Introduction

The International Security Council stands as a pivotal component of the United Nations framework, entrusted fundamentally with the maintenance of global stability and the advancement of a peace-dominated world order. This body plays a crucial role in addressing the menace of international criminality that plagues humanity, particularly in the milieu of wars, conflicts, and ensuing tensions that could infringe upon the most basic human rights, notably the right to life and physical integrity. In this regard, the Security Council actively participates in attributing accountability for diverse violations perpetrated against individuals.

This entity also acts as the executing arm for resolutions passed by the United Nations, issuing decisions intermittently in cases where international peace and security are compromised. Furthermore, it serves as an effective mechanism in the realm of human rights by safeguarding these rights and enhancing their flourishing. This is exemplified by the establishment of special criminal tribunals, such as those for Yugoslavia and Rwanda, among others. Additionally, the Security Council's role extends to referring cases to the International Criminal Court (ICC).

As stipulated in Article 13(b) of the Rome Statute of the ICC, the Security Council, operating under Chapter VII of the UN Charter, is empowered to refer situations to the Prosecutor wherein it appears that one or more crimes described in Article 5 have been committed.

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This underscores the Security Council's role in international adjudication through its referrals of matters that alarm the international community and constitute violations of international humanitarian law to the ICC, thus enabling the court to fulfill its protective criminal mandate. This is achieved without undermining the foundational legal principle of judicial independence of the ICC, notwithstanding the Council's controversial powers to defer or suspend investigations and trials.

The objective behind granting the politically oriented Security Council the authority to refer grave cases to the ICC is to facilitate the establishment of criminal justice principles that the international community aspires to, compelling both state parties and non-parties to cooperate with the court.

The Problematic

The relationship between the Security Council and the ICC is governed by the UN Charter and the foundational statutes of the ICC, making the relationship strictly legal. This pertains to the exercise of referral powers in accordance with Article 13(b) of the Rome Statute, and the deferral mechanism under Article 16.

This interrelationship raises numerous questions about its impact on the functioning of the ICC, especially considering the enhanced powers of the Security Council in this area as a purely political entity.

In exploring this issue, our discussion is organized into several sections: the first section delves into the Security Council's role in initiating legal actions at the ICC; the second section discusses the limitations imposed on the Security Council in the context of the ICC; the third section examines the ICC's authority to review referrals by the Security Council; and the fourth section explores the Council's power to defer and suspend investigations and trials.

Firstly, the role of the International Security Council in initiating proceedings at the International Criminal Court

Those who follow the relationship between the International Security Council and the International Criminal Court will find that it has raised some disputes for several reasons. Some view that the Council hinders the Court's work, including the assumption that permanent member states of the Security Council cannot commit crimes covered by the Rome Statute, and even if such crimes are committed, they would not be subject to the law. Additionally, there is a perspective that the Security Council should not be given any role to avoid any political influence that could compromise the independence of the Court. Even the permanent member states themselves have disagreed on the issue of initiating proceedings at the Court, where some, like the United States, see the Security Council as the only entity authorized to initiate proceedings, whereas other permanent members believe that the Council should be one of the entities that can initiate proceedings, but not the only one (1).

However, returning to Article 13 of the Rome Statute, for the Security Council to exercise its powers according to Chapter VII, it must precisely verify the existence of violations, i.e., crimes against humanity, to refer the case to the International Criminal Court. This implies a definite threat to international peace and security. Nevertheless, the course of action that the Security Council may take remains ambiguous, as to whether the measure relates to procedures or to the

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substance. If the condition requires substance, then the Security Council does not have general jurisdiction to raise the case to the Prosecutor of the International Criminal Court. Its jurisdiction is defined under Chapter VII of the Charter only in situations that threaten international peace and security. However, the situation differs if the condition pertains to procedures, as the Security Council has no authority, and this limitation is based on Articles 24 and 39 of the United Nations Charter, which enable the Council to report on a state's commission of the alleged act, all within the legal framework that regulates the relationship between the Security Council and the International Criminal Court (2).

In general, under Articles 39 and 41 of the United Nations Charter, the Security Council has the authority to determine whether there is a threat to international peace and security, and accordingly, to take whatever it deems appropriate to preserve security, including judicial measures. This justifies the creation of special criminal tribunals by it in case there is a need to establish such courts. In this regard, the supportive stance for the Security Council's jurisdiction in creating special criminal tribunals is based on the opinion issued by the International Court of Justice in the Namibia case in 1971, which affirmed the possibility of the Security Council issuing decisions not based on Chapter VII, but rather on the entirety of the United Nations Charter texts. This is based on the responsibility entrusted to it in maintaining international peace and security, which allows it a range of powers to take appropriate measures to stabilize conditions, even if not explicitly stipulated in the United Nations Charter (3).

Thus, returning to the basis of granting the International Security Council the authority to refer to the International Criminal Court in the face of international crime, it encourages the Council to forego the establishment of special criminal tribunals. On the other hand, involving the International Security Council in referring crimes to the Court, in addition to those referred by the Prosecutor of the Court and the state parties, reduces the possibility of its monopolizing the cases (4).

The principle is that the international legislator has tried to make the International Criminal Court independent and autonomous, not subservient to any international organization. Although this independence does not prevent the Security Council from referring cases to it, as confirmed by Article 4/1. On one hand, when the Council refers a case to the Court, it is not bound by the conditions specified in Article 12/2 of the Rome Statute, which involve the commission of a crime by a national of a state party or on the territory of that state. The Council acts under the provisions of Chapter VII (Article 39) of the Charter.

It is noticeable that the Rome Statute of the Court uses different terms when referring any situation to the Court to initiate proceedings. It uses the term "situation" when referring to matters involving the Security Council—a broad term compared to when the matter relates to the right of the Court's Prosecutor to initiate an investigation in a specific situation, where the term "crime" is used—a narrow and precise meaning. This indicates a desire by the state parties to restrict the powers and authorities of the Prosecutor on one hand, and on the other hand, to assign the term "situation" to the Security Council, which is a broad term and gives the Prosecutor the possibility to analyze the admissibility and jurisdiction of the referred situation, also granting him independence and avoiding any mandatory nature (5).

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The Court's action upon referral of a case is under its universal jurisdiction, which supporters of the creation of the International Criminal Court see as binding for all states (6).

In this context, we can refer to the scope of authority granted to the Security Council to refer cases to the International Criminal Court, whether from a substantive, temporal, or spatial perspective, to take appropriate measures in situations threatening international peace and security.

Substantively, and referring back to Chapter VII of the United Nations Charter, the authority of the Security Council in referrals is not limited to specific cases but includes other crimes stipulated in the Rome Statute of the International Criminal Court, whether related to war crimes, crimes against humanity, genocide, or the crime of aggression.

The concept of international peace and security does not stop at this narrow meaning but has extended beyond the relations between states to include the protection of the rights of individuals and groups even within the state itself. This expansion has been imposed by the evolution of international law rules, which have become not only the law of states but have transcended this to become the law of the entire international community or humanity as a whole. Gradually, international law rules have allowed individuals to appear before certain international bodies, and in line with this development, a connection between the concept of international peace and security and the need to respect human rights has emerged. The connection lies in the fact that respecting human rights and fundamental freedoms is a fundamental factor for the stability of international peace and security, which is the primary goal for which the United Nations was established (7).

Thus, international peace and security are gradually transforming into the peace and security of humanity and the international community, making it logically extend the jurisdiction of the Security Council in referrals to all crimes mentioned in the Rome Statute of the International Criminal Court, not limited to the crime of aggression or aggressive war, taking into account the extension of the Security Council's authority in referrals regarding crimes not listed in the Rome Statute, such as illicit drug trafficking, illegal migration, and money laundering (8).

In this regard, some see a risk with the authority granted to the Security Council, which automatically leads to the disruption of the complementary jurisdiction that links the International Criminal Court with national judiciaries, through depriving the local judiciary of the concerned state of its authority to consider a specific crime. Additionally, this referral from the Security Council applies to all state parties and non-parties to the Rome Statute due to the binding nature of the Council's decisions.

The opposing view to this authority granted to the Security Council sees it as a political entity intervening in the workings of international justice, potentially leading to selective, authoritative deprivation of the Court's jurisdiction, contrary to the rules of justice and away from sound legal logic (9). In this framework, we see that the Security Council, enjoying this power, can be influenced by political considerations, especially under the absolute control of the major powers, particularly those with permanent membership in the Security Council.

It is worth noting that the "Darfur" issue was the first case referred by the Security Council to the International Criminal Court, under its Resolution No. 1593 dated March 13, 2005, acting according to Chapter VII of the United Nations Charter (10).

Secondly, the restrictions imposed on the International Security Council for referring cases to the International Criminal Court

For the International Security Council to properly exercise its authority in referring crimes threatening international peace and security to the International Criminal Court, several conditions are required, as follows:

- The subject of the referral must fall within the substantive jurisdiction of the International Criminal Court: The case referred by the International Security Council must pertain to one or more of the crimes that fall exclusively under the substantive jurisdiction of the International Criminal Court, as defined by Article 5 of the Court's Rome Statute, which includes:
 - Crimes against humanity
 - War crimes
 - Genocide
- Crime of aggression The referral decision by the International Security Council must match the Court's jurisdiction; otherwise, it would be flawed due to lack of jurisdiction. Furthermore, the referral must be fully compliant with the provisions of Chapter VII of the United Nations Charter.
- The exclusive authority of the International Security Council in making referrals: The International Security Council must have the exclusive and sole authority to make referrals (11).
- The referral must be based on Chapter VII of the United Nations Charter, as confirmed by the Rome Statute of the International Criminal Court in paragraph "b" of Article 13, which states: "... if the Security Council, acting under Chapter VII of the United Nations Charter, refers a situation to the Prosecutor in which it appears that one or more of these crimes have been committed..." (12)
- No prior referral of the matter to the International Criminal Court by other entities, meaning that the situation should not be simultaneously under consideration, such as being referred by a state party to the Rome Statute or a state that has accepted the Court's jurisdiction, taking into account the temporal criterion for the entry into force of the Rome Treaty as the Court's jurisdiction is not retroactive (13).
- The referral decision must be issued with the approval of nine members of the Security Council, including the permanent members, in accordance with the provisions of Article 27 of the United Nations Charter, which stipulates:
 - Each member has one vote
 - Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine of its members...." (14)
- National courts should not have already seriously begun exercising their jurisdiction over the case. In this regard, a part of the international legal doctrine believes that the jurisdiction of

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the International Criminal Court does not commence unless the failure or refusal of national judiciaries to prosecute, investigate, and trial is established, affirming the principle of complementarity between the national judiciary and the jurisdiction of the International Criminal Court (15).

Thirdly, the authority of the International Criminal Court to review the referral decision of the International Security Council

The Rome Statute has enhanced the independence of the International Criminal Court by defining the rules of the Court's jurisdiction and the admissibility of cases before it. It has made the referral of international crimes by the International Security Council to the Court a formal procedure, as the latter does not have any authority to accept the case or determine the Court's jurisdiction, but rather informs and alerts the Prosecutor to significant facts that require investigation. The referral decision by the International Security Council is not binding on the International Criminal Court to commence investigation and prosecution procedures.

This provides the Court with guarantees against any potential dominance by the Council and allows the Prosecutor's discretionary power to decide whether or not to initiate an investigation into a matter. If the Prosecutor of the International Criminal Court chooses not to initiate investigation procedures, the International Security Council can resubmit the request to the Court's Pre-Trial Chamber for the Prosecutor to reconsider his decision (16).

It should be noted that referring a specific situation to the International Criminal Court is among the non-procedural matters and also depends on the approval of at least nine members of the Security Council, including the votes of the permanent members.

On the other hand, the Council's work in this matter is linked to the principle of complementarity of the Court, where the Council must consider the willingness and capability of the concerned state to prosecute the perpetrators of these crimes when referring a case falling under the Court's jurisdiction. If this aspect is neglected, the Court may not accept the referral (17).

It is also important to note that the authority of the International Security Council to refer matters to the Prosecutor of the International Criminal Court is not always automatic and does not necessarily involve international crimes, as this matter is subject to legal, operational, and political limitations. Referring a situation to the Prosecutor does not automatically lead to an investigation. Additionally, consideration must be given to Articles 17 and 18 of the Rome Statute, which emphasize the principle of complementarity, especially if the concerned state expresses a desire to pursue the crime and prosecute its perpetrators.

Furthermore, the admissibility of the referral depends on whether the situation involves serious crimes as stipulated in Article 5 of the Rome Statute (18).

Fourthly, the authority of the International Security Council to defer or suspend investigations or trials

The International Security Council has the right to request a deferral or suspension of investigations or trials according to Article 16 of the Rome Statute of the International Criminal Court for a period of twelve months, as part of a decision taken under Chapter VII.

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In this context, we can discuss several nuances as follows:

A/ Scholarly perspectives on granting the Security Council the power of deferral and suspension

The issue of the International Security Council's authority to defer or suspend investigations or trials has sparked scholarly debate between supporters and opponents.

Supporters of this authority argue that it fundamentally stems from the powers granted to the International Security Council under the United Nations Charter, and therefore, the Council has the right to suspend investigations as provided in the Rome Statute of the International Criminal Court, even though the Statute restricts these powers. According to proponents, the purpose of the Council's power to defer or suspend investigations or trials is to facilitate peace negotiations, while they also see the necessity of limiting the use of this power as much as possible (19).

Opponents criticize this authority because political considerations may interfere with the Security Council's decisions regarding the deferral and suspension of investigations and trials, potentially allowing the dominant powers within the Council, namely the permanent member states, to halt or prevent any investigation or trial based on this procedure.

From this perspective, it is essential to avoid political considerations in the operations of the International Criminal Court to achieve international justice. Opponents advocate for the elimination of the International Security Council's authority to defer or suspend investigations or trials as stipulated in Article 16 of the Rome Statute.

Another faction within this view believes that the Security Council's authority to suspend proceedings at the International Criminal Court is based on a presumptive right through its exclusive jurisdiction concerning international peace and security, and thus, the Court should not handle cases involving threats to international peace and security without the Council's authorization.

In addition to these perspectives, there is another viewpoint that advocates for oversight of the Security Council's authority to defer and suspend (20).

However, a review of Article 16 of the Rome Statute of the International Criminal Court shows support for the perspective that recognizes the Security Council's authority to defer and suspend.

B/ Conditions for exercising the International Security Council's authority to defer or suspend investigations or trials

To exercise its authority to defer and suspend, the Security Council must meet several conditions, which can be summarized as follows:

- The case in question must be presented to the Security Council for decision-making.
- The Council must assess that the case poses a threat to international peace and security.
- The request directed to the Court to not start or to suspend the investigation or prosecution must be pursuant to a decision from the Council based on the provisions of Chapter VII of the

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United Nations Charter and the Rome Statute of the International Criminal Court, for a period of twelve months, which can be renewed indefinitely.

Based on this authority, the Council has two types of powers:

- A political power through the direct right to intervene to preserve international peace and security.
- A judicial power manifested in the deferral of investigations and prosecutions.

This grants the permanent members of the Security Council both a political and judicial role in the context of unbalanced international relations.

It is necessary that the role of Article 16 of the Rome Statute be confined to the situation described in Article 13 paragraph "b" without extending to paragraphs "a" and "c", ensuring the independence of the Court and restricting Article 16 of the same Statute for the proper conduct of justice (21).

The International Security Council operates according to Chapter VII of the United Nations Charter, with the approval of nine of its members, including the five permanent members, as per a resolution. Article 24 of the United Nations Charter states that "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. 2. The Security Council shall act in accordance with the Purposes and Principles of the United Nations, and the special powers granted to the Security Council to enable it to carry out these duties are set forth in Chapters VI, VII, VIII, and XII.... etc."

C/ Format of Deferral

Article 16 of the Rome Statute of the International Criminal Court specifies a particular format for deferring investigation or trial (.....based on a request from the Security Council to the Court in this regard contained in a resolution issued by the Council under Chapter VII of the United Nations Charter....).

From the above, it is clear that the format of the deferral is linked to a request from the Security Council without any other form of address.

In the midst of this request, there have been legal scholarly debates about the obligatory nature of the deferral request, with some supporting the Court's compliance with this request without any authority to scrutinize its legality and its compliance with the requirements of Article 16 of the Court's Statute.

On the other hand, another faction believes that the Court has the authority to decide on the legality of the Council's decision and determine its compliance, based on the difference in the terms used, as the Rome Statute used the term "requests" and not "decides," not to mention that the Court is an independent judicial body and can take the action it deems appropriate (22).

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D/ Duration of Deferral

Article 16 of the Rome Statute of the International Criminal Court specifies the duration of the deferral as 12 months and does not specify a particular date for calculating this period, which is supposed to be from the date of the request submission by the International Security Council to the Prosecutor of the International Criminal Court.

Moreover, this article (Article 16 of the Rome Statute) addresses the issue of renewing requests, meaning that the Council's authority to defer and suspend is not tied to a specific number of requests.

This issue was particularly debated and contested among the delegations of countries participating in the Rome Diplomatic Conference, where some countries proposed reducing the severity of this authority granted to the International Security Council and suggested not renewing the suspension period, and if there were to be a renewal, it should not exceed one time. However, this proposal faced opposition, particularly from the United States and the permanent member states of the Security Council, who insisted on not specifying the number of times a deferral or suspension request could be made, thereby lifting restrictions on the Security Council's ability to submit requests whenever it deemed appropriate (23).

Nonetheless, what can be pointed out is that allowing the International Security Council to submit requests without specifying their number could hinder international justice and may undermine the efforts supposed to be made by the Court in prosecuting perpetrators of international crimes.

On the other hand, the provision of Article 16 of the Rome Statute affects the powers of the Prosecutor of the International Criminal Court to initiate or not initiate an investigation, as the Council's exercise of the authority to defer and suspend contradicts the Prosecutor's duties, especially after being granted permission by the Pre-Trial Chamber to investigate a case.

If the decision to suspend the investigation by the Council is accepted, it will pose a problem in terms of procedural rules and rules of evidence.

Moreover, deferring or suspending the investigation in the interest of preserving international peace and security could compromise the achievement of criminal justice (24).

All this occurs in the absence of any oversight bodies over the International Security Council concerning cases of deferral or suspension of investigations, which contradicts the rules of justice and could lead to the dominance of this international political body at the expense of a judicial body that is supposed to be independent in both device and tasks, particularly in light of the orientations of the permanent member states in this Council.

Conclusion

What can be concluded on the topic of the International Security Council's authority to activate the specific jurisdiction of the International Criminal Court through referral, is that this mechanism is positive in terms of fostering international judicial cooperation, especially if viewed from the perspective of ensuring that perpetrators of international crimes do not escape justice, even if the state is not a party to the Rome Statute of the International Criminal Court.

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Also, the crimes that the International Security Council can refer due to them being a threat to international peace and security, and which fall within the specific jurisdiction of the Court, do not require prior acceptance, thus not affecting the binding force of its decisions, which indirectly supports the idea of the International Criminal Court's universal jurisdiction through the Security Council, ensuring prosecution and punishment.

However, the negative aspects of the International Security Council's intervention in international prosecution through its referrals of cases that pose a threat to international peace and security are that its decision to refer is contingent on the approval of nine of its members, including the permanent members, who significantly influence its decisions in practice. It is noticeable that there are cases that require referrals to the International Criminal Court, but the selectivity used by the permanent member states in the Council prevents this, necessitating a reconsideration of the decision-making process at the Security Council level and the exclusion of political considerations that have come to dominate its work.

In addition, it can be argued that the International Security Council's authority to defer investigation and trial, which extends even to stopping them, can be considered an obstruction to the judicial process and the efforts made by the International Criminal Court to achieve criminal justice, especially since the twelve-month period mentioned in Article 16 of the Rome Statute is renewable indefinitely, which conflicts with the rules and principles of justice. In this regard, it is necessary to amend Article 16 of the Rome Statute of the International Criminal Court, which grants the Council extensive powers that should be regulated in accordance with the requirements of justice.

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