

THE CRITICAL ANALYSIS OF THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE UNITED NATIONS SECURITY COUNCIL

*(Uluslararası Ceza Mahkemesi ile Birleşmişler Milletler Güvenlik Konseyi
Arasındaki İlişkinin Eleştirel Analizi)*

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ABSTRACT

International society sought to establish a mechanism to ensure international peace and security in the wake of World War 1 and World War 2. United Nations (UN) and the United Nations Security Council (Security Council), political organ of the UN, which has almost plenary power were emerged due to this intention. In this regard, the Security Council has an important duty to perpetuate international peace and security. The International Criminal Court (ICC) has jurisdiction over four types of international crimes which are genocide, crimes against humanity, war crimes and aggression. Under the Rome Statute, the Security Council can refer a situation where one or more of the criminal acts are perpetrated in the area of a state which has not confirmed the Rome Statute or are offended by the citizens of similar a nation to the ICC to prosecute, and may accept a decision pursuant to Chapter VII of the UN Charter of the ICC may not proceed the prosecution. Some commentators believe that the interventions including referral and deferral of the Security Council undermine the ICC's independence and impartiality.

Keywords: The United Nations Security Council, The International Criminal Court, Referral, Deferral, International Peace and Security.

ÖZ

Birinci ve ikinci dünya savaşlarının ardından uluslararası toplum uluslararası barış ve güvenliği sağlamak için bir mekanizma oluşturma arayışına girdi. Birleşmiş Milletler ve Birleşmiş Milletler'in politik organı ve tam yetkiye haiz olan Güvenlik Konseyi bu niyet dolayısıyla ortaya çıktı. Bu bakımdan, Birleşmişler Milletler Güvenlik Konseyi uluslararası barış ve güvenliği daimi hale getirme gibi önemli bir göreve sahiptir. Savaş suçları, insanlığa karşı suçlar, soykırım suçu ve saldırı suçlarından oluşan

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dört çeşit uluslararası suç Uluslararası Ceza Mahkemesi'nin yargılama yetkisindedir. Roma Statüsü kapsamında, Birleşmiş Milletler Güvenlik Konseyi bir veya birden fazla suç eyleminin henüz Roma Statüsü'nü onaylamamış bir devletin sınırları içerisinde veya henüz Roma Statüsü'nü onaylamamış bir devletin vatandaşları tarafından işlenmesi halinde Uluslararası Ceza Mahkemesi'ne bu olayın soruşturulması için başvurabilir ve Birleşmiş Milletler Sözleşmesi'nin 7. Bölümüne göre Uluslararası Ceza Mahkemesi'nce soruşturmanın yürütülmemesine ilişkin karar alabilir. Bazı yorumcular Birleşmiş Milletler Güvenlik Konseyi'nin başvurma ve erteleme gibi müdahalelerini Uluslararası Ceza Mahkemesi'nin tarafsızlık ve bağımsızlığına zarar verdiğiğine inanmaktadırlar.

Anahtar Sözcükler : Birleşmiş Milletler Güvenlik Konseyi, Uluslararası Ceza Mahkemesi, Başvurma, Erteleme, Uluslararası Barış ve Güvenlik.

INTRODUCTION

International institutions have been created because of the need and necessity. It is noteworthy to say that these institutions require global support and willingness for their establishment. Lots of challenges experienced by the universal society has resulted in the improvement of intercontinental institutions and the acts of the members of the society have replied these challenges.² As a result of the destructive effect of the both World War 1 and World War 2, global community craved the international amity and safety. United Nations (UN) and the Security Council, political organ of the UN, which has almost plenary power were emerged due to this intention. In addition, it can be easily stated that the International Criminal Court (ICC) was created due to the same intention.

Up to now, 139 states have signed and 123 states have confirmed the Rome Statute of the International Criminal Court (Rome Statute). The Rome Statute assures the aims and rules of the Charter of the United Nations (the UN Charter)³, constitutes the ICC as a lasting body self-governing of the UN organisations in its preamble.⁴ Furthermore, the Rome Statute gives some authorities regarding the legal power of the ICC to the Security Council. This article, after presenting the functions of the ICC and the Security Council, will critically assess the relationship between these institutions.

2 Jarin Neha, "A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court", *The European Journal of International Law* (2005), Vol: 16 No: 2, at 239.

3 Preambular Paragraph 7 of the Rome Statute of the International Criminal Court, 1998, 37 ILM (1999) 999 (hereinafter Rome Statute).

4 Preambular Paragraph 9 read with Article 1 of the Rome Statute.

I. THE FOUNDATION OF THE ICC

Since the time of the ancient Greeks, presumably before this time, war offenders have been prosecuted. There are some faiths derived from philosophy and religion in relation to the cardinal worths of the human being soul are affirmed by the common attitude, even in the harshest conditions of cruel armed conflict.⁵ The ideas of international prosecution for humanitarian exploitation started to appear gradually through the improvement of the international humanitarian law in the mid-nineteenth century.⁶

On 22 February 1993, the ad hoc tribunal was founded by the Security Council's decision for "people liable for severe contraventions of international humanitarian law perpetrated in the region of the previous Yugoslavia since 1991".⁷ Additionally, in November 1994, the second ad hoc tribunal, entrusted with the prosecution of genocide and other severe contraventions of international humanitarian law offended in Rwanda and in neighbourhood in the time of 1994 was created.⁸

The Rome Statute of the International Criminal Court was accepted on 17 July 1998 by the United Nations General Assembly. Sixty confirmations or accessions were necessitated for the Statute came into force. The ICC cannot prosecute crimes perpetrated before 1 July 2002 the Rome Statute came into force.

II. THE FUNCTION OF THE ICC

The notion of "global offences" has been existing about for centuries. These were recognized as offences whose oppression challenged some international dimension.⁹ The ICC can judge four types of international criminal acts: genocide, crimes against humanity, war crimes and aggression. In both the preamble to the Statute and Article 5, these are determined as "the most severe offences as regards to the international community wholly".

Under the Statute, there is no formal hierarchy among the four categories of crime. The International Criminal Tribunal for Rwanda has named genocide "the crime of crimes". Genocide is only one of the international offenses which was started out in the Rome Statute initially and adopted

5 Schabas A. William, *An Introduction to the International Criminal Court*, Cambridge Press, 3rd edition, at 1.

6 *Ibid.*, at 2.

7 UN Doc. S/RES/808 (1993).

8 UN Doc. S/RES/955 (1994).

9 Schabas A. William, *"An Introduction to the International Criminal Court"*, Cambridge Press, 3rd edition, at 82.



by the drafters with virtually no disagreement.¹⁰ Article 6 of the Rome Statute defines genocide. Under the definition, five specific acts including “killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children from the group to another group”¹¹ are composed of genocide committed to destroy a national, ethnical, racial or religious group as such wilfully.

There are some inconsistent definitions of crimes against humanity in a series of instruments, whereas genocide and war crimes have been codified in covenants with extensively accepted definitions.¹² Article 7 of the Rome Statute defines crime against humanity consists the specific merciless acts, such as murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape, forced pregnancy, sexual slavery, the crime of apartheid, persecution and other inhumane acts, and these must be element widespread or systematic attack directed against any civilian population.¹³

Unlike crimes against humanity, war crimes don't need extensive or systematic commission, while a war crime can be made up by a single isolated act.¹⁴ War crimes are defined thoroughly in the Article 8 of the Rome Statute which involves crimes such as “willful killing, torture or inhumane treatment, forcing a prisoner of war to serve in the forces of a hostile power, taking hostages, directing attacks against civilians, directing attacks against humanitarian workers or UN peacekeepers, using child soldiers, summary execution, pillage, rape, forced prostitution or forced pregnancy”.¹⁵

The definition of aggression has been the most controversial issue for the states. Although there had been many unsuccessful attempts to constitute joint definition of aggression, on 11 June 2010, the definition of the crime of aggression accepted in the Review Conference of Rome Statute held in Kampala. Article 8 bis explains the individual crime of aggression as the planning, preparation, initiation or execution by a person in a leadership position of an act of aggression.¹⁶ According to this amendment, the ICC

¹⁰ Ibid., at 92.

¹¹ Article 6 of the Rome Statute.

¹² Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Willmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge Press, 2nd Edition, at 230.

¹³ Article 7 of the Rome Statute.

¹⁴ Ibid., at 267.

¹⁵ Article 8 of the Rome Statute.

¹⁶ Article 8 bis of the Rome Statute.

will be entitled to carry out its jurisdiction until after 1 January 2017.

The Court does not have universal jurisdiction. The court can prosecute people when:

- *Criminal acts have been perpetrated in the region of state which has affirmed the Rome Statute;*
- *Criminal acts have been perpetrated by a citizen of a state which has affirmed the Rome Statute;*
- *A state which has not affirmed the Rome Statute has expressed adopting the court's jurisdiction over the crime;*
- *Criminal acts have been perpetrated in a condition which threatens or breaches international peace and security and the UN Security Council has referred the situation to the Court in conformance to Chapter 7 of the UN Charter.*

The ICC has no jurisdiction on occasions which took place before 1 July 2002. With the exception of the fact that a State may admit the legal power of the Court for the term previous the Statute's entry into force, the ICC can solely judge after the Statute became effective for that State if a State joins the ICC after 1 July 2002.¹⁷ The national courts can primarily judge these crimes. Under the rule of "complementarity",¹⁸ the ICC only takes an action when the national courts are unable or unwilling to take a step. For example, a government might charge its own nationals unwillingly because suspects are in important position, or a government cannot prosecute because there is no effective criminal justice system on the grounds of the domestic clash.¹⁹

III. THE TRIGGERING MECHANISMS OF THE JURISDICTION OF THE ICC

Three ways of "triggering" the jurisdiction are offered by the Rome Statute. According to Article 13 of the Rome Statute, which is entitled "exercise of jurisdiction", states:

"The ICC 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;*

¹⁷ Article 11 of the Rome Statute.

¹⁸ Article 1 of the Rome Statute.

¹⁹ http://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court. (accessed March 20, 2015).



(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.”²⁰

A State Party does not require any specific permission to refer a “situation” to the ICC. The prosecutor can commence investigation on his own initiative. He may select from offences perpetrated on the territory of any of the States Parties to the Statute as well as crimes committed by citizens of any of those States Parties anywhere else in the world.

The Security Council can refer a situation where one or more of the criminal acts are perpetrated in the area of a state which has not confirmed the Rome Statute or are offended by the citizens of similar a nation. The prosecutor can make a decision whether to commence an investigation in case of the States and Security Council’s referral. Moreover, these investigations subject to ICC’s judicial confirmation to prosecute.

IV. THE ROLE OF THE SECURITY COUNCIL

It is comprehensively known that the existence of international peace and security is the primary purpose of the UN,²¹ and that this goal has primacy over all other devotions of the organization.²² According to the plan of the UN Charter, this aim is implemented by the Security Council the main organ which is given duty.²³ The Security Council is ordered to act to perpetuate international peacefulness and security.²⁴ Article 23 of the Charter of the United Nations proclaims that “the Security Council consists of five permanent members, China, France, Russia, the United Kingdom and the United States.” In addition, the General Assembly elects non-permanent members from among the membership of the organisation to two-year terms. Admitting resolution requires at least nine votes and no veto from any permanent member.²⁵

20 Article 13 of the Rome Statute.

21 Article 1(1) of the Charter of the United Nations, 1945, 1 UNTS 16. (hereinafter UN Charter).

22 Leland Goodrich, Edvard Hambro, and Anne Simons, *Charter of the United Nations: Commentary and Documents* (1969), 16; Clyde Eagleton, “The Jurisdiction of the Security Council over Disputes”, *The American Journal of International Law* No.40 (1946) at 513.

23 Article 24 of the UN Charter.

24 Neha Jarin, “A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court”, *The European Journal of International Law* (2005), Vol. 16 No. 2, at 242.

25 Schabas A. William, “An Introduction to the International Criminal Court”, Cambridge Press, 3rd edition, at 152.

A. The Referral of the Security Council

Article 13(b) which entrusts the ICC to carry out its legal power over criminal acts within its jurisdiction in conformance with Article 5 if “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” codifies Security Council referral.²⁶ Chapter VII of the Charter 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.” Through the Security Council referral which includes circumstances containing dangers to or violations of international peace and security, the prosecutor has a chance to commence an investigation in conformance to Chapter VII of the UN Charter. Moreover, the Security Council’s Chapter VII enforcement force confers the execution of the requests and orders of the ICC effectively and timely.²⁷ In other words, the Security Council can direct that all UN member countries fully collaborate with the ICC in any investigation referred by the Council. This mechanism has a deterrent effect upon the individuals or officials who have an exception under the ICC jurisdiction.

On the contrary, in principle, there is a worry which how the exceptionalism of those countries not parts of the Rome Statute, particularly from among the permanent members of the Security Council, can be justified, expressly of opening to the ICC another country not party while they do not admit the ICC’s jurisdiction over themselves.²⁸ Moreover, the Security Council is a political organ and it can probably select situations on political, not legal, reasons. The conflict in Syria is a good example to show the probability of selecting conditions on political ground. The UN estimates that more than 10,000 civilian have been killed since the beginning of the conflict in Syria. Many states and non-governmental organizations are looking forward a Security Council referral of the situation in Syria. Moreover, The Security Council has founded only two ad hoc tribunals since 1950s.

The Security Council Resolution 1593 refers of the situation in Darfur, in western Sudan, to the ICC. This resolution purposes to except

²⁶ Ibid., at 151.

²⁷ Amnesty International 1998, “The International Criminal Court 16 fundamental principles for a just, fair and effective international criminal court”, AI Index: IOR 40/12/98, at 3.

²⁸ Chattam House, “The UN Security Council and the International Criminal Court”, International Law Meeting Summary, with Parliamentarians for Global Action, on 16 March 2012, at 3.



jurisdiction over “nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court.” In addition, both the Security Council 1497 resolution concerning Liberia²⁹ and the Security Council 1970³⁰ resolution concerning Libya included entirely same provision.³¹ It can be overtly claimed that this provision is surely inappropriate with the Rome Statute. William A. Schabas states: “Indeed, this is why the concept of referral in the Rome Statute relates to ‘situations’ rather than to ‘cases’.” The language was adopted specifically to avoid the danger of one-sided referrals, which could undermine the legitimacy of the institution”.³² It is noteworthy to claim that the Security Council made efforts to undermine the Court via these three resolutions.

In both Darfur and Libya resolutions, the Security Council declares: “such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.” Many discuss that the Security Council took action over its authorization because the UN Charter gives responsibility on making budget to the General Assembly.³³

On the other hand, there are some other resolutions the Security Council have promoted and advanced the ICC. The first one is Resolution 1960 passed in 2011 is relevant to women, peace and security. This resolution emphasizes the interests with respect to sexual offence against women and girls in armed conflict conditions and declares that the ICC is one instrument through for which criminals can be responsible. The second one is Resolution 1998 passed in 2011 is related to children and armed conflict. This resolution emphasizes the ICC’s function in terminating impunity for offenders of criminal acts against kids in combat circumstances. As regards the preservation of noncombatant in armed collision, the Security Council organizes meeting to discuss on protection of civilians in armed combat during which many countries and UN officers repeat the essential position of the ICC in this endeavor. It can be noted that these resolutions have increased the role of the ICC.

B. The Deferral of the Security Council

Under the Article 16 of the Rome Statute, the Security Council may accept a decision pursuant to Chapter VII of the UN Charter of the ICC

29 UN Doc. S/RES/1497 (2003).

30 UN Doc. S/RES/1970(2011).

31 Schabas A. William, “An Introduction to the International Criminal Court”, Cambridge Press, 3rd edition, at 156.

32 Ibid., at 157.

33 University of California, Irvine, School of Law, International Justice Clinic, “The Council and The Court: Improving Security Council Support of the International Criminal Court”, May 2013, at 6, 7.

may not proceed. The ICC was prevented from coping with a case “being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.”³⁴ Although the Security Council has not yet used this deferral triggering up to now, this authorisation must be evaluated theoretically. This has met with severe critique as intervention with the independence and impartiality of the ICC. Lots of people think that the whole process can be discredited by permitting political thinking to impress prosecution.³⁵ William A. Schabas states: “At the same time, it must be recognised that there may be times when difficult decisions must be taken about the wisdom of criminal prosecution when sensitive political negotiations are underway. Should the Court be in a position to trump the Security Council and possibly sabotage measures aimed at promoting international peace and security?”³⁶

Indian delegations criticized sharply this provision in the final vote of the statute. The statement was: “On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. The moment this argument is conceded, the Conference accepts the proposition that justice could undermine international peace and security.”³⁷

I strictly believe that the Security Council cannot halt or even suspend an ongoing investigation or prosecution because there is not any legitimize reason under international law or customary law to block justice. Any delays in an investigation or prosecution can lead irreparable damages. Facilitating the devastation of evidence, intimidation of witnesses, the decrease of hope towards jus can be given as examples. Furthermore, justice must not be a bargaining chip in political issues. There have been a handful of attempts have been made in the context of the investigations into Kenya, Darfur, Uganda, Côte d’Ivoire and the Central African Republic to invoke Article 16 up to now. Fortunately, the Security Council has not yet made deferral in these situations.

³⁴ Article 16 of the Rome Statute.

³⁵ Schabas A. William, “An Introduction to the International Criminal Court”, Cambridge Press, 3rd edition, at 167, For the debates, see Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, paras. 124–5; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22, paras. 140–4.

³⁶ Ibid.

³⁷ ‘Explanation of Vote by India on the Adoption of the Statute of the International Criminal Court, Rome, July 17, 1998’, at 3.



As a consequence, the Security Council is unwilling to apply deferral into ongoing investigation. The Security Council resolutions 1422(2002), 1497(2003), and 1593(2005) regarding peacekeepers protected citizens of countries which has not yet ratified the ICC statute from the ICC's jurisdiction. It is important to say that there is no reason for these deferral under the Rome Statute and UN Charter, this privilege is the formation of politic intervention with the ICC that is unwanted given the standards of non-discrimination in international criminal law.

CONCLUSION

The Security Council has an important duty to take actions to keep international peace and safety. The ICC has jurisdiction over four types of international offenses which are genocide, crimes against humanity, war crimes and aggression that are risk to international amity and safeguard. It can be noted that these two independent institutions have almost same goal. The relationship between the Security Council and the ICC is controversial because many believe that the interventions including referral and deferral of the Security Council undermine the ICC's independence and impartiality. Some issues related to Syria, peacekeepers, and funding can be given examples to show the Security Council act with political interest.

I strongly think that the Prosecutor can commence an investigation about condition where one or more of the criminal acts are perpetrated in the area of a state which has not confirmed the Rome Statute or are offended by the citizens of similar a nation subject to judicial approval instead of the Security Council referral. The Security Council should direct that all UN member nations fully collaborate with the ICC in any investigation, and should support the ICC with its enforcement powers pursuant to Chapter VII of the UN Charter. From my point of view, the Security Council deferral is interference with the independence and impartiality of the ICC and like this authority is never given to political organ.

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