

International Criminal Court: Funding of the Court and Relationship with the Security Council

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Abstract: *The paper focuses on the effect that realpolitik has had on weakening the International Criminal Court. The forces of realpolitik guide the political world and the court has to undoubtedly operate in the prevailing political environment and counter these forces when it can in order to fulfill its objectives. The court has a political relationship with the UNSC. The provisions of the statute relating to the power of the court will be discussed along with their realpolitik implications. Focusing on its powers of referral and deferral and the status of the permanent members of the UNSC vis-à-vis the ICC. A brief outline of the situation in Libya and Darfur will also be presented. Furthermore a brief outline of the financial framework of the court will be provided along with an analysis of how the resource crunch the court is facing affects its operations. An analysis of the realpolitik that operates behind the funding of the ICC will be discussed.*

Index Terms – Funding - Realpolitik – UNSC

1. Security Council and the ICC

The idea behind the adoption of the Rome Statute of the International Criminal Court in 1998 was that the investigation and prosecution of international crimes should be taken out of a context of power politics and would be conducted on a permanent basis and by an independent (transnational) judicial entity that operates according to the principle of the separation of power, which is the basic requirement of the rule of law¹

The relationship between the United Nations Security Council (UNSC) and the ICC has always generated intense debate and discussion. The UNSC has a very important role to play in the enforcement of international criminal justice and has been tasked with securing and maintaining international peace and justice under the UN Charter. The ICC similarly has been created to prosecute the most serious crimes of concern to the international community as a whole and is an institution created to enforce criminal justice; as a result it too has an important role in maintaining international peace and security. While the ICC is not a part of the United Nations, it has a cooperative relationship with the organization and especially with the UNSC. The provisions of the Rome Statute provide some context to the relationship between these two vital organs of criminal justice.

The Rome Statute has provided the UNSC with the power to defer an investigation or prosecution by the court by a period of 12 months, if the UNSC adopts a resolution to that effect under Chapter VII of the UN Charter, this resolution may be renewed annually.² The UNSC however has not used this power of deferral till date. Further the UNSC also has the power to refer a situation to the court for investigation. It is important to note that the UNSC can refer a situation even where the nation in question is not a state party to the court, thus expanding the jurisdiction of the court of non-member states as well.³ The UNSC has so far referred two situations to the court, in Libya and Darfur. This relationship was envisaged with the purpose of removing the need to create ad hoc tribunals by the UNSC and for it to utilize the ICC for dealing with international crimes. Out of the 5 permanent members of the UNSC only 2 are members of the court with Russia, China, and USA refusing to become members and thus remaining outside the jurisdiction of the court.

The debate around the ICC-UNSC relationship has often been around the role and power granted to the UNSC vis-a-vis the operations of the court. It is often argued that the UNSC members have utilized the court to further their own strategic interests, displaying a hint of realpolitik. The UNSC in the view of some states has been handed a potential stalling tactic through its power of deferral, however the adoption of such a resolution is a very difficult task considering that it can be negated by a veto of any permanent member, and thus all permanent members would need to have an aligned policy goal in order to adopt such a resolution.

Another criticism that is often raised is that while the most powerful nations continue to remain outside the jurisdiction of the ICC, they still have the power to control the operations of the ICC from the outside and can refer cases to it. They have the power to refer cases of states that are not even party to the Rome Statute. They thus can control the ICC from the outside without being subject to it. This is where some important realpolitik considerations arise.

In a recent speech in London, Louise Arbour, the former chief Prosecutor for the ICTY and the ICTR, similarly acknowledged: "...international criminal justice cannot be sheltered from political considerations when they are administered by the quintessential political body: the Security Council. I have long advocated a separation of the justice and political agendas, and would prefer to see an ICC that had no connection to the Security Council. But this is neither the case nor the trend."⁴

It is worth considering how permanent members of the UNSC can subject states to the jurisdiction of a treaty based court that they have not ratified yet while themselves remaining immune from such prosecution despite having been repeatedly accused of committing such crimes.

¹ Köchler, Hans, *Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice*, INTERNATIONAL PROGRESS ORGANIZATION ONLINE PAPERS, (Apr. 7, 2018, 11:02 am) www.i-p-o.org/koechler-ICC-politicization.

² Article 16 Rome Statute, 1998

³ Article 13(b) Rome Statute, 1998

⁴ Mark Kersten, *The UN Security Council and the ICC: Between a Rock and a Hard Place* (May. 2, 2018 12:36

PM) <https://justiceinconflict.org/2011/05/06/the-un-security-council-and-the-icc-between-a-rock-and-a-hard-place/>.

Both situations referred to the court so far have been of non-member states. Article 98.2 of the Statute states that the court may not proceed with a request for surrender, which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court. This provision has been manipulated by states such as USA who have signed numerous bilateral agreements of the like with countries in order to gain immunity for their nationals from prosecution by the court. This opens the court up to accusations of double standards. It is clearly unacceptable that states with special and historical responsibility for world peace and security should undermine the court's legitimacy in this way. Those who claim the mantle of global leadership should lead by example.⁵ This however is the result of operating in a world where political power and influence is unequally distributed. This distribution of political influence is not something the court can counter.

The ICC is an independent and non-political institution, acting in the interest of the international community – it should not be treated as a political instrument of the Council. To use the Court, as a tool of the SC will inevitably politicize it, make it controversial and damage its chances of becoming a universal institution.⁶

With its referral practices the UNSC and its permanent members have often been accused of realpolitik exercises and closer inspection would show that these are not without merit.

Darfur

6. Decides that 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 shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;⁷

Effectively through this resolution the UNSC shields nationals of non-party states (other than Sudan) participating in UN or AU operations in Sudan from jurisdiction of the ICC and placed the entire financial burden of the investigation on shoulders of the ICC member states.

Libya

5. Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;

6. Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State;

8. Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;⁸

The UNSC did a similar thing with its resolution for Libya. It shielded nationals of non-party states from ICC prosecution, and placed the entire financial burden of the investigation on shoulders of the ICC member states. Along with this it only urged states and not directed them to fully comply with the Court and the Prosecutor.

For the ICC to effectively deal with situations referred by the Council under Chapter VII, it needs to be able to count on the full and continuing cooperation of all UN members, whether they are parties to the Rome Statute or not. This includes not only cooperation in investigations and the gathering of evidence, but also in areas such as the execution of arrest warrants and tracing the assets of suspects. In making any future referrals, it would be very helpful if the Security Council could underline this obligation of full cooperation, without which it is very difficult for the ICC to discharge the mandate the Council has given it.

An area of concern for many ICC States Parties has been the financial implications of these referrals. This complex issue is principally for UN members to consider. Clearly it will be difficult to sustain a system under which a referral is made by the Security Council on behalf of the UN, but the costs of any investigation and trial proceedings are met exclusively by the parties to the Rome Statute.⁹

Extract from the Twelfth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)¹⁰

⁵ Kofi Annan, *State impunity is back in fashion – we need the international court more than ever* (May.2 2018 12:40 PM) <https://www.theguardian.com/commentisfree/2016/nov/18/state-impunity-international-criminal-court-african>.

⁶ Remarks by Judge Hans-Peter Kaul At the Experts' Discussion "10 years International Criminal Court and the Role of the United States in International Justice".

⁷ RESOLUTION 1593 <https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>.

⁸ Resolution 1970 (2011) http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970%20%282011%29

⁹ Judge Sang-Hyun Song, President of the International Criminal Court, Remarks at United Nations Security Council Open Debate, "Peace And Justice, With A Special Focus On The Role Of The International Criminal Court". http://www.iccnw.org/documents/121017_ICC_President_remarks_to_UNSC_FINAL.pdf?utm_source=CICC+Newsletters&utm_campaign=44c748b68e-.

¹⁰ (May 2, 2018 2:24 PM) <https://www.icc-cpi.int/Pages/item.aspx?name=161109-otp-stat-UNSC1970>.

22. Notwithstanding the many difficulties posed by the investigation of the Libya situation, including in particular resource challenges, my Office will do all it can to significantly expand investigations in 2017.

37. To conclude, Mr President, the Council referred the situation in Libya to my Office. The referral by definition carries great responsibility to seek justice for the countless civilians who have been victims of the widespread crimes in Libya since 15 February 2011. Compelled by this responsibility, I have decided to allocate additional resources from within my Office's overall budget to the Libya situation. I have no choice if further concrete progress is to be made in our investigations.

38. Without this Council's support, this allocation will necessarily come at the expense of investigations of other crimes in other situations. I appeal to this Council to recognise the collective responsibility arising out of your referral and to support financial assistance by the United Nations for my Office's Libya investigations in 2017. The Libyan people deserve no less.

With regard to the Syrian Conflict

Since Syria is not a state party to the court, the ICC can exercise jurisdiction over it only through a UNSC referral. However, despite its mandate to maintain international peace and security, this has been hard to come by due to the different strategic interests of all the various permanent members of the UNSC involved in the region. Russia and China have vetoed various resolutions to bring Syria under the jurisdiction of the ICC. The crisis is clear and the violations glaring and overwhelming however strategic geopolitical interests have prevented the UNSC from seizing the matter and instead they have acted in a manner where they are more worried about protecting their friends than they are of prosecuting those who are responsible for these crimes.

The ICC is thus effectively made an ad hoc court of the Security Council. The situation is further aggravated by the fact that – due to the veto power of the five permanent members – it is considerations of political opportunity, not of law, that determine the criteria for decisions which have a decisive impact on the further development of international criminal justice.¹¹

The ICC needs the support and the backing of the UNSC specially where enforcement mechanisms are concerned and cooperation by states is need, it does not need the UNSC to politicize the court.

In a perfect world, Council members would not allow political motivations or allegiances to obstruct the need for justice and accountability; ideally, the P-5 members would refrain from use of their vetoes and would all become parties to the Rome Statute, enhancing their credibility in referring situations arising in other states.¹² Unfortunately this is not the realpolitik-guided world that ICC has to operate in.

2. Realpolitik and the funding of the court

The funding of any institution is important to analyze how effective it can be in undertaking its duties and obligations. Since the court carries out functions globally, it is important that it has adequate resources to undertake its operations and function effectively. The funding of the court is covered in the provisions of Part 12 of the statute.

*Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.*¹³

The Assembly of State Parties oversees the funding and financing of the court and contributions are made primarily by the state parties.

The Rome Statute lays out the basic structure of the Court's financial framework:

- There is a single financial framework for both the Court and its overseeing body, the Assembly of State Parties (art. 113-115).
- The Court and the Assembly are financed from assessed contributions from State Parties, which are based on the scale adopted by the United Nations for its regular budget; and from funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council (Art. 115).
- Voluntary contributions are allowed, as additional funds, in accordance with relevant criteria adopted by the Assembly of State Parties (art. 116).
- The Assembly of State Parties considers and decides the budget of the Court (art. 112.2(d)).
- The Court has an independent auditor (art. 118).¹⁴

Article 115 is the result of a compromise between two conflicting schools of thoughts at the Rome Conference. While in Rome all states agreed on the need to secure adequate and long-term funding for the Court, some delegates favored a budget funded primarily through the UN. This option would have provided reliable and stable source of financing and ensured the universal character of the Court by its linkage with the United Nations. Other delegates, however, felt that, as long as universality of the Court was a mere aspiration, exclusive or primary funding by the UN, could raise serious issues of state sovereignty and equity, as a potentially large number of UN members would be funding an organization to which they did not belong.¹⁵

The statute also provides for a penalty in terms of a loss of voting rights if the amount of arrears of a state party equals or exceeds the amount of the contributions due from it for the preceding two full years. However the assembly has the power to permit such a state to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.¹⁶

Comparing the relation between the Security Council and the court it was decided that since the court would be providing a "service" to the Security Council, it was deemed just and equitable that the UN would contribute to the expenses deriving from those additional investigations and/or trials.¹⁷

¹¹ Hans Köchler, (May. 3 2018 09:20 AM) <https://thewire.in/external-affairs/the-illusion-of-justice-under-the-international-criminal-court>

¹² Moss, Lawrence, "The UN Security Council and the International Criminal Court: Towards More Principled Relationship," Friedrich Ebert Stiftung, March 2012, page 10, <http://library.fes.de/pdf-files/iez/08948.pdf>

¹³ Article 113, Rome Statute, 1998

¹⁴ The Financing of the ICC – A Discussion Paper - Cesare Romano
http://www.pict-pcti.org/publications/ICC_paprs/FinancingICC.pdf

¹⁵ *ibid*

¹⁶ Article 112.8 Rome Statute 1998

¹⁷ *supra* 13

The ICC is financed primarily by contributions from its states parties. The amount payable by each state party is determined using the same method as the United Nations, each state's contribution is based on the country's capacity to pay, which reflects factors such as a national income and population. The maximum amount a single country can pay in any year is limited to 22% of the Court's budget. The court's budget is decided on a yearly basis at the meeting of the Assembly of State Parties.¹⁸

The funding of the court is critical to its efficiency in carrying out its operations, however this too is not aloof from the forces of Realpolitik and strategic state interests. While the court has faced criticisms of taking too long to carry out trials and investigations and thus denying justice in the process, a relation can be drawn between these and the resources available to the court to carry out its functions. The court has severely been restricted in being as efficient as it could be due to a lack of resources and funding.

The first approved budget of the court was 53 million Euros, in the year 2004.¹⁹ Since then it has increased on a yearly basis, while states have criticized this demand, they have overlooked the fact that the caseload of the court is constantly increasing and thus it needs additional resources to carry out its tasks. The court's budget increased from 80.5 million Euros in 2007 to 101.2 million Euros in 2009.²⁰ Since 2009 the court has faced various criticisms regarding its budgetary demands and its related output. There have been demands by various countries to propose a zero nominal growth in the budget for the court. Canada, Colombia, Ecuador, France, Germany, Italy, Japan, Poland, Spain, UK and Venezuela led this initiative to restrict the funding of the court, ignoring even the analysis of independent expert bodies that the court was severely under financed and needed additional resources. In a move of Realpolitik, just a few weeks before moving the proposal for zero growth the then Canadian Foreign minister had stated that "We must work harder to enable the court to better protect the inhabitants of other continents against those who trample their most fundamental rights with impunity. We need more of the International Criminal Court, not less."²¹

The court's approved budget for 2016 was 139.5 million Euros with the Prosecutor receiving 43,233 million and the Registry receiving 72,759 million.²² In 2017 the approved budget was 144.5 million Euros with the Prosecutor receiving 44.9 million and the Registry receiving 76.6 million.²³ For 2018 the budget is 147.4 million Euro, with the Prosecutor receiving 45.9 million and the Registry receiving 77.1 million. While it would seem that the budget has shown an upward trend, the ratio of the funding of the court to the resources it requires for carrying out its trials and investigations is highly unfavourable. It emerged that total arrears of €34.16 million, €17.88 million of the 2016 contributions from member states and €15.95 million from previous years remains unpaid.²⁴

While under the provisions of the act it was envisioned that the Security Council would pay the costs that arise due to its referrals, in reality the Security Council does not finance the court in any way for the costs that are realized in the court's investigations for its referrals in Libya or Sudan.

Sudan

*7. Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;*²⁵

Libya

*8. Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;*²⁶

The prosecutor has also raised the issues of lack of resources acting as a hindrance in carrying out effective investigations.

Sudan

*The Office is allocated a limited budget to conduct investigations into multiple situations before the Court. Due to the pressing needs of investigations in other situations, the investigations into the Darfur situation operate on the basis of severely restricted funding which invariably affects the pace of the investigation. The Office, therefore, once again, invites the Council to support and facilitate financial assistance from the UN which would allow the Office to conduct investigations in the Darfur situation more effectively.*²⁷

Libya

17. Increased investigation into crimes that are alleged to have occurred post-2011 will require substantial resources in order to enable the Office to continue to conduct its work effectively. The Office will therefore significantly increase the resources it dedicates to the Libya

¹⁸ Resolution ICC-ASP/6/Res.4

¹⁹ Programme Budget for 2004, Doc. ICC-ASP/2/10

²⁰ Resolution ICC-ASP/7/Res.1

²¹ States shouldn't use ICC budget to interfere with its work, By Elizabeth Evenson and Jonathan O'Donohue

<https://www.amnesty.org/en/latest/news/2016/11/states-shouldnt-use-icc-budget-to-interfere-with-its-work/>

²² Resolution ICC-ASP/14/Res.1 <https://www.legal-tools.org/doc/2c9828/pdf/>

²³ Resolution ICC-ASP/15/Res.1 <https://www.legal-tools.org/doc/8a2d9e/pdf/>

²⁴ <http://africanbusinessmagazine.com/uncategorised/who-pays-for-the-icc/>

²⁵ RESOLUTION 1593

<https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>

²⁶ Resolution 1970 (2011)

http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970%20%282011%29

²⁷ Twenty-sixth report of the prosecutor of the international criminal court to the united nations security council pursuant to UNSCR 1593 (2005) - https://www.icc-cpi.int/itemsdocuments/26-rep-UNSCR_1596_ICC-OTP_Eng.pdf

investigation. The allocation of such resources will inevitably come at the expense of other investigations required in other situations. In addition, within the Libya situation itself, the Office will be forced to prioritise between investigating competing, equally serious alleged crimes. The Office once again invites this Council to support and facilitate financial assistance by the United Nations for the Libya investigations, to ease the overall financial burden placed on the Office by the Council's referral.

30. The Office underscores that increasing its investigations in Libya will necessarily be at the expense of investigations in other situations. The Council referred the Libya situation to the Court. The Office continues to urge the Council to support its on-going efforts in Libya, and in particular, to support and facilitate financial assistance by the United Nations for investigations in 2017. Regrettably, the Council has so far failed to provide any meaningful support, financial or otherwise, to the Office's work in Libya.²⁸

When compared to the budgets of the International Criminal Tribunal for Yugoslavia and Rwanda (ICTY and ICTR) some realpolitik insights can be gained. The annual budget for the ICTY has gone up multi-fold since it began life in 1993. In 1997, with one operating courtroom, two trials, 142 witnesses, nine investigations, and 20 detainees (at the end of the year), its costs were \$36.3 million. For the two-year period 2010-11, it had risen to over \$301m (£192m). The ICTR budget for 2010-2011 was \$257m (£165m) and it has 750 posts.²⁹ Compared to these tribunals it can clearly be understood that the ICC would then have higher budgetary requirements for the following reasons.

- The ICC operates on a global scale compared to these tribunals that had limited geographic jurisdiction
- The ICC is a permanent institution whose work will only increase with time.
- The ICC incurs significant costs in carrying out its procedures and trials due to a high number of official languages and translations required as a result, along with its procedures of victim participation and reparations that incur significant financial costs
- The ICC also incurs significant costs in providing legal assistance for defence counsels.
- The ICC maintains a much bigger staff than the tribunals and it will only increase this number as the workload of the court increases.

Some of the wealthiest and powerful nations are not state parties to the ICC and this has also reduced the scope for its funding compared to other international organizations to which these countries contribute significantly. The United States of America currently pays nothing to the ICC, however it contributes 22% of the regular budget of the United Nations (approx. \$622 million).³⁰ Accordingly Russia contributed 75 million, India 17 million and China 192 million to the UN budget.³¹ It is clearly visible how much the ICC is suffering financially due to these wealthy and powerful states not being member parties to the court. In 2017, despite having over 123 members the ICC budget had two-thirds of its contributions from only 10 countries, such as Japan, South Korea, Canada.³² Those most in need of an institution like the ICC are in no position financially to fund the ICC.

There is however one criticism of the ICC funding procedure that must be fixed. Currently under Article 116 of the statute the court can receive voluntary contributions from governments, international corporations, individuals, and other entities both in monetary terms and in kind. In spite of this, the court provides no details on funds received in this manner and who these donors are. It does raise objections at the perceived impartiality of the court and how these donations may affect the actions of the court, specially if these donors have an interest in the proceedings and decisions of the court. This creates potential for misuse of the court and its institution to further strategic self goals. The court should make this list transparent and open to scrutiny so that any misconceptions are cleared.

Thus critics that accuse the ICC of being inefficient and burning through funding while not giving adequate results should realize that the ICC supports multiple investigations, trials and also its staff requirements. All this while operating in a world where investigations are often difficult to conduct and cooperation is needed with states that are all too happy to see it fail. Yet it manages to operate on such a meager budget and provide justice to the victims. The court has an important role to play in the global context and it should not be limited by resource and financial hindrances.

²⁸ Twelfth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011) https://www.icc-cpi.int/iccdocs/otp/16-11-10_OTP-rep-UNSCR-1970_ENG.pdf

²⁹ Ten years, \$900m, one verdict: Does the ICC cost too much?

By Jon Silverman <http://www.bbc.com/news/magazine-17351946>

³⁰ <http://www.foxnews.com/opinion/2015/06/16/america-pay-way-too-much-for-united-nations.html>

³¹ <http://www.un.org/en/ga/contributions/honourroll.shtml>

³² The real story behind the ICC - Dan Steinbock (May 1, 2018 6:45 PM) <http://www.manilatimes.net/the-real-story-behind-the-icc/387141/>