Journal OF LEGAL STUDIES
International Academic and Scientific Review published semi-annually by the Laboratory of Sovereignty and Globalization - Yahia FARES University of MEDEA
ISSN 2437-0304
EISSN: 2602-5108
Dépôt légal: 2015-3039

Volume: 07 **Number: 01** **Year : JAN 2021** **P :266-290**

The Effect of Security Council Resolutions on the International Criminal Court Complementarity Regime

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Received: 12/08 /2020 **Accepted: 29/12 /2020** **Published 01/01/2021**

Abstract

This paper carrying out an analysis pertaining to complementarity regime enshrined in the Rome Statute (RS), points out that this principle is the focal point of the ICC, and aims at reconciling international criminal jurisdiction with national judiciary orders; giving priority to national courts. However, when the States fail to exercise jurisdiction, the ICC steps in as a Court of last resort.

The Paper also addresses the issue of whether and to what extent the Security Council (SC) resolutions adopted pursuant to Articles 13 (b) and 16 of the RS can disregard and consequently abrogate the complementarity regime. The study argues that the complementarity regime is made ineffective following resolutions issued by the Security Council under Chapter 7 of the United Nations Charter.

Key Words: referral -deferral request –abrogate – complementarity regime

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1-Introduction

The International Criminal Court was set up in 1998 and its founding statute came into force in 2002, with a main objective, to participate in a global fight to end impunity and hold offenders accountable for their crimes during armed conflicts, that threaten peace and security in the world, namely: the crime of genocide, crimes against humanity, war crimes and the crime of aggression, all of them codified in the Rome Statute in article 5.

Those most serious crimes of concern to the international community as a whole, must be investigated, prosecuted and punished by states primarily, as they have territorial criminal jurisdiction, as referred to in the tenth paragraph of the Rome Statute Preamble and article 1: "The International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". This complementary relationship between the ICC and national criminal jurisdictions means that the ICC is a court that complements and supplements national criminal jurisdictions, and does not have supremacy over national judiciary orders, as it only plays a subsidiary role. The ICC is meant to assume jurisdiction when national legal systems are "unwilling or unable genuinely to carry out the investigation or prosecution ", according to article 17 of the Rome Statute.

However, some scholars argue that the complementarity regime is undermined by the United Nations Security Council (UNSC) when acting under chapter 7 of the UN Charter (UNC), as the organ is vested with the primary responsibility to ensure and maintain international peace and security. In the light of this argument, this article scrutinizes whether and to what extent, the UNSC can disregard the ICC complementarity regime, and, thus abrogate it when acting under Chapter 7. Academic thought is divided on the subject matter. This study seeks to resolve the issue through a comprehensive analysis of the Rome Statute and the UN Charter, to this effect, the analytical and descriptive methods are used for answering the research problematic.

The research is divided into three parts: Part 1 is devoted to analyse the complementarity principle under Rome Statute, part 2 deals with the referral of a situation by the Security Council to the Prosecutor of the ICC acting under chapter 7 of the United Nations Charter (UNC), in which

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one or more of the crimes mentioned in article 5 of the Statute is alleged to have been committed, and it also addresses the power of deferral of investigation or prosecution which may be triggered by the UNSC and its implication upon complementarity.

2-Complementarity Principle under Rome Statute

Where should investigation, prosecution and trial of individuals charged with the most egregious crimes be done? In national criminal courts or at the International Criminal Court in The Hague?

Unlike the two ad hoc temporary tribunals (International Criminal Tribunal for former Yugoslavia and International Tribunal for Rwanda) which had primacy over domestic criminal systems, the ICC Rome Statute, hereinafter "Statute" provides that the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level, and that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, and emphasized that the International Criminal Court under this Statute shall be complementary to national criminal jurisdictions[1], respecting national sovereignty, and it could as well serve as a basis for reconciliation, rule of law, judiciary efficiency, and strengthen democracy, and that the ICC was established in order to fill in lacunae of accountability derived from States' unwillingness or inability to prosecute. It should be noted that the adoption of this regime is aimed at balancing the interests of States with those of global justice, in order to prevent the impunity of criminals. To this effect, the author proposes to explore the complementarity principle through addressing: admissibility and the procedural framework of admissibility.

2.1- Issues of Admissibility before the International Criminal Court

It must be noted that the Rome Statute sets forth specific limitations on the Court's subject matter, territorial, personal, temporal jurisdiction, and establishes four admissibility criteria as well. These criteria restrict the situations when the Court shall have the power to exercise its jurisdiction

[1] - See the Preamble of the Rome Statute of the International Criminal Court adopted on 17 July 1998, entered into force on 1 July 2002.

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over persons for the most serious crimes of international concern: the crime of genocide; crimes against humanity; war crimes and the crime of aggression. It is worth reminding, that the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute; that to say, on the 1st of July2002, and they are committed by individuals holding the nationality of one of the States Parties, and the Court's jurisdiction can also be triggered when the above crimes are committed on the territory of one of the States Parties[2], and finally when a situation is referred to the Court by the UNSC.

In addition to paragraph 10 of the Preamble of the Statute and Article 1, the complementarity regime is addressed once more in Article 17 regarding admissibility issues. Article 17 of the Statute provides that: "1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State, which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct, which is the subject of the complaint, and a trial by the Court is not permitted under Article 20 paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

Article 17, confirms that at the heart of the Rome Statute, is the idea that first and foremost, the domestic courts should deal with the most egregious crimes, and the ICC will exercise its jurisdiction as a Court of last resort, i.e., when the States fail to prosecute the cases.

[2] - See articles 5, 11 and 12 of the Rome Statute of the International Criminal Court.

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The first requirement provided by Article 17 (1) (a): either a State is investigating or prosecuting the case at hand, or has investigated it and refrained from prosecuting the person concerned, this inaction leads to the admissibility of situations and cases before the ICC[3]. It poses a debatable point, i.e. the exception to inadmissibility: a case can be admissible before the International Criminal Court, although it is investigated or prosecuted by a State which has jurisdiction over it, if the latter is "unwilling or unable genuinely to carry out the investigation or prosecution". The Statute determines unwillingness in a particular case when some specific situations are available:

(a) The proceedings were or are being undertaken or the national decision was made for shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;

(b) There has been an unjustified delay in the proceedings, which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were not or are not being conducted in a manner, which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice[4].

Article (17) (2) (a) requires proof of a purpose of shielding, which is considerably high threshold and raises the question of how such an intent is to be proved before the Court. As far as paragraph (b) is concerned "unjustified delay" in the proceedings, is no easy task to be established, since it is uncertain how such delay should be determined. As for paragraph (c), undoubtedly, a lack of impartiality and independence of the proceedings can only lead to the admissibility of a case where these worked in favour of the accused[5]. In order to define the notions of

[3] - Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity". https//www. mpil.de/files/pdf3/mpunyb_7pdf

[4] - See Article 17(2) (a-b-c).

[5] - Markus Benzing, op.cit, p.610.

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independence and impartiality, one has to refer to the jurisprudence of the International Criminal Court of Former Yugoslavia, the International Criminal Court of Rwanda, the European and American Human Rights Courts, and the conclusions of the debates of the Diplomatic Conference for drafting the Statute. As for the unjustified delay, the reference to be adopted is the combination of rules encapsulated in human rights instruments and the rules that make up a common threshold for all national jurisdictional orders.

Inability is another criterion where available makes the concerned state incapable of exercising its primary jurisdiction, and renders the case admissible before the ICC. In this context, article 17(3) provides that: "In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

The Statute sets out three pre-requisites for inability. These three distinct scenarios are meant to be because of a complete breakdown of the national judicial system of a state or its unavailability, due to significant social destabilizing troubles or when it loses control over its territory or hardly hit by a natural disaster or war. These three circumstances are: "(a) a state is unable to obtain the accused; (b) a state is unable to obtain the necessary evidence and testimony; (c) a state is unable to carry out its proceedings".

A crucial question is worth asking about unavailability: when could it be said that a national legal system is unavailable? For some scholars, domestic systems will most probably be considered unavailable, simply because the judicial system is non-existent. This probably will rarely occur, it would occur, when a newly political system has been established with no judicial system in place. Yet Some assess that nothing differentiates "total collapse" from "unavailability", however, it is unlikely that the drafters incorporated the term unavailability as a synonym for total collapse, nor did they include it to grant the ICC an open -ended discretionary power in determining "inability"[6]. It has also

[6] -Bassiouni M. Cherif, « The ICC-Quo Vadis", Journal of International Criminal Justice, vol.3, July 1 2006, p.423.

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been indicated that a national judicial order can be deemed "unavailable" if the grave crimes within the jurisdiction of the Court are prosecuted and punished only as common crimes. This assessment seems to go well beyond the requirements of complementarity regime.

A case is as well inadmissible before the Court where the alleged perpetrator has already been tried for conduct which is the subject of the complaint, unless the proceedings before the domestic court, were for the purpose of shielding the person concerned from criminal responsibility; or otherwise they were not conducted independently or impartially[7]. Finally, the case is inadmissible before the Court where it is not of sufficient gravity. No interpretation is provided by the Statute to this criterion, so the Court is expected to develop a jurisprudence in virtue of its major scope of discretion. However, the author thinks that "sufficient gravity refers to the most serious crimes of concern to the international community as a whole (article 5 of the Statute), and can be interpreted as relating to perpetrators having an official capacity or military responsibilities, and the wrongdoings must be committed as part of a widespread or systematic attack or part of a general policy.

In conclusion, the idea to be retained is when the State fails to exercise its jurisdiction, a case becomes admissible before the International Criminal Court, as for the voices that contest the large discretionary power of the ICC to assess "inability" or "unwillingness", the response is that the States have ratified the Rome Statute on grounds of free consent and of good faith and the pacta sunt servanda rule, which implies that the States have approved to be bound by the Statute, and the Assembly of States Parties to the Rome Statute can stop and prevent abuses via introducing the necessary amendments.

2-2.The Procedural Framework Relating to Admissibility

This part of the article is dedicated to an overview of the procedural framework of admissibility and its relation with the complementarity principle. In this regard, it should be noted that Articles 18 and 19 complete Article 17, and provide the modalities of implementation of the

[7] - See articles 17(1)(c) and 20(3) of the Rome Statute.

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complementarity regime i.e., how admissibility works in terms of procedure.

The preliminary rulings regarding admissibility start functioning when one or more of the crimes referred to in Article 5 alleged to have been committed are referred to the Prosecutor or when the latter has initiated an investigation proprio motu in accordance with Articles 13(a) and 13(c) respectively, and following the referral, the Prosecutor is bound pursuant to the Statute to determine whether or not there is a reasonable basis to commence an investigation, in the positive case, he must notify all States Parties and those States which would normally exercise jurisdiction over the crimes concerned[8]. As a result the effective prosecution of the most serious crimes of concern are ensured by taking measures at the national level in virtue of complementarity. Article 18(2) provides that: "Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation". The next paragraph (Article 18/3) highlights the possibility accorded to the Prosecutor to review the deferral six months after the date of deferral or at any time where there has been a significant change in circumstances based on the State's unwillingness or inability. The scrutiny of paragraphs (2) and (3) reveals that complementarity puts the onus on States to investigate and prosecute the individuals charged with the alleged serious crimes, however, if it assesses that they fail to do their duty because they are unwilling or unable, or because they don't fairly and properly conduct the proceedings, the Court steps in and exercises jurisdiction.

It should be noted that four main objectives have been assigned to Article 18 by the drafters of the Statute: highlighting that complementarity is the focal point of the Statute, encouraging and allowing States to investigate and prosecute at an early phase, avoiding parallel investigations and proceedings, and finally, using

[8] - See article 18(1) of the Rome Statute.

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complementarity as a mechanism for checking and restricting the powers of the Prosecutor of the ICC[9]. However, the Prosecutor is vested with the power to monitor and watch the proceedings which are activated at the domestic level, if they are not conducted properly, after six months or at any time, the Court exercises its jurisdiction in accordance with the complementarity principle.

It is worth recalling in this context that when the Prosecutor decides to initiate investigations proprio motu on the grounds of information made available to him or her, on condition that it provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed, he or she cannot commence the investigations unless he receives the authorization from the preliminary chamber. When this procedure occurs, this means that the Court has determined on its own motion that the case is admissible before its judicial bodies. It may happen that challenges to the admissibility of the case on the grounds referred to in Article 17 or challenges to the jurisdiction of the Court are made by the accused person or a State Party or State having accepted the exercise of jurisdiction by the Court.

Modalities relating to challenges made to the jurisdiction or admissibility of a case are embedded in Article 19 paragraph 4 and the subsequent paragraphs. It is indicated that the challenges can only be brought once by any person or State referred to previously, and it takes place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant a leave for a challenge lodged more than once or at a time later than the commencement of the trial. The decisions rendered by the Pre-Trial Chamber or the Trial Chamber with respect to jurisdiction or admissibility may be appealed against to the Appeals Chamber.

After the analysis of Article 19, it comes out that the mechanism of challenging jurisdiction or admissibility consolidates the notion of complementarity and states that the interests of a State must be observed and its right to prosecute the case before its domestic courts must be

[9] -Almoktar Ashnan, Le Principe de Complémentarité entre la Cour Pénale Internationale et la Juridiction Pénale Internationale, Thèse de Doctorat, Université François-Rabelais de Tours, France, Soutenue le 16 Juin 2015, p. 205.

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preserved as well. However, the State which wishes to successfully challenge admissibility of a case must comply with the requirements included in Article 17 mainly: the ability and willingness to prosecute the crimes, and the State must demonstrate that it conducts genuine proceedings,i.e, its action cannot be a sham; it must be genuine, concrete, effective, and significant. If so, the case will be inadmissible before the Court[10].

In order to overcome some polemical issues raised by some scholars and some States pertaining to admissibility, it is highly recommended to make further effort via jurisprudence-to give a more accurate interpretation to "inability" and "unwillingness", and this effort can either be done by the Chambers or the Assembly of States Parties in the framework of its legislative powers.

Subjecting Articles 17, 18 and 19 to scrutiny, one easily concludes that they leave it to the Court itself to assess the admissibility of a case and say the final word on whether to initiate proceedings in connection with a given case.

With regard to the rationale of complementarity: it is well-established that the purpose is to protect States' right to exercise criminal proceedings over crimes contained in the Statute within their jurisdiction and ensure that they abide by their duty to give full effect to this right, in case of their failure to do so, the Court steps in to prevent the impunity of criminals as a court of last resort. Thus, it appears that complementarity is designed to strike a balance between two conflicting concepts; namely the state sovereignty and international criminal justice.

3-Complementarity Regime and the United Nations Security Council Powers (Articles 13 and 16 of the Rome Statute)

The relationship and interaction between the Security Council and the International Criminal Court can be traced in the United Nations Charter, the Rome Statute provisions and the Negotiated Relationship Agreement

[10] -Karolina Wierczynska, Admissibility of a Case before the International Criminal Court, Polish Academy of Sciences, Research Gate, 30 October 2019, p.7and p.15.

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between the International Criminal Court and the United Nations[11]. Both of them are united by a common purpose: to preserve and maintain peace and security in the world[12], it is as well provided in paragraph 7 of the ICC Preamble that the Court reaffirms the purposes and principles of the Charter of the United Nations. With regard to the Rome Statute, it stipulates in Article 2 that the Court shall be brought into relationship with the United Nations through an agreement.

Besides what has previously been mentioned about the relationship between the Security Council and the International Criminal Court, Articles 13 and 16 of the Rome Statute[13] provide an additional legal basis for that relationship; these two Articles are reiterated in Article 17 of the Negotiated Relationship Agreement aforementioned. The provisions of these two articles grant great powers to the Security Council according to many authors who contend that this UN body (political organ) in virtue of these powers will have sway and control over the proceedings of the Court, and they have warned of the dangers of politicizing the Court and undermining its independence and the principles governing its functioning[14]. Our focus in this particular portion of the paper is whether Articles 13 and 16 actually preclude the complementarity regime from being operational.

3.1-Referral of a Situation by the Security Council to the ICC and its Effect on Complementarity

[11] - Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Official Journal Publication, Assembly of States Parties to the Rome Statute, 04l10l2004;

[12] - See the Preamble and Article 39 of the United Nations Charter.

[13] - Articles 13 and 16 are about referral of a situation and request for deferral of proceedings by the Security Council to the Court. They will be examined with more details subsequently.

[14] -Double standard has been practised by the Security Council since it has twice referred situations to the Court: the situation in Darfur, Sudan, Resolution 1593 and situation in Libya, Resolution 1970. However, the Situation in Syria has not been referred yet, despite the horrifying death toll and the evidence of mass atrocities.

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Whether or not to grant the SC the power to trigger the Court's jurisdiction was a highly controversial issue during the Rome Diplomatic Conference for the creation of the ICC. The supporters argued that this authority would allow the council "to initiate recourse to the Court by dispensing with the requirement of the acceptance by a State of the Court's jurisdiction, potentially extending the jurisdictional reach of the Court to encompass the entire globe. However, some delegates argued that internationalizing the proposed Court through the rubric of SC resolutions would have worrying consequences for its credibility and moral authority"[15]. The critics of the power to refer a situation expressed concerns over the manipulation of a judicial institution by a political body and that the latter may encroach upon the independence of the Court and undermine some of its core principles.

The friction point over whether or not the SC should be vested with the authority to trigger the Court's jurisdiction, ended up with the adoption of Article 13 (b) of Rome Statute: "The Court may exercise jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if:(…) (b)-A situation in which one or more crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter 7 of the Charter of the United Nations…". As provided by some scholars, it is reasonable and legal to endow the SC with a mechanism to trigger the jurisdiction of the Court as an enforcement action for the maintenance of international peace and security pursuant to Chapter 7 of the UNC.

The main purpose of this provision 13 (b) is to extend the jurisdiction of the ICC to crimes occurring outside the territory of a State Party and committed by non-nationals of a State Party, since in the case of a Security Council referral it is not necessary to show any link between the crime committed and a State Party. Therefore, in the case of a Security Council referral the state in respect of which a situation has been referred

[15] -Harry Orr Hobbs, "The Security Council and the Complementarity Regime of the International Criminal Court: Lessons from Libya", University of Technology Sydney, Faculty of Law, Australia, 2012, pp. 35-36.

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to the Court is likely to be a non-party to the ICC Statute[16]. This provision contributes to set up international criminal justice, and thus, peace, as it has a deterrent effect upon individuals who cannot be prosecuted under the Statute.

It is noteworthy that according to Article 13(b) and Article 17 of the Negotiated Relationship Agreement, the referral is effected in the form of a resolution issued by the SC, and pursuant to Article 27 (3) the decisions of the SC pertaining actions under Chapter 7 of the UNC shall be made by an affirmative vote of nine members including the concurrent vote of the permanent members. In addition, to the previous conditions, the situation referred to the Court shall be made with respect to a crime spelled out in Article 5 of the Statute, and the subject-matter of the referral shall fall under Chapter 7 provisions; that is to say, the SC triggers jurisdiction within the ambit of an action relating to threats to the peace, breaches of the peace, and acts of aggression[17]in order to maintain or restore international peace and security.

To analyze the impact of the SC referral on the complementarity mechanism, it is relevant to scrutinize the legal framework enshrined in the United Nations Charter (A) and the practical applications that occurred with respect to real cases (B).

A- As for the effect of the SC referral resolutions upon the complementarity framework, some provisions enshrined in RS and UNC can provide some basis for discussion. These provisions raise some persisting questions as to whether the UNSC as the principal organ charged with ensuring and maintaining international peace and security, can invalidate complementarity and endow the ICC with jurisdictional supremacy. The author tries to address this contentious issue through analysing some relevant RS and UNC provisions.

[16] -Dapo Akonde, "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC", Journal of International Criminal Justice, Volume 10, Issue 2, May 2012, p.300.

[17] -The Charter does not lay out any limitations or definitions to the terms: threat to the peace, breach of the peace and act of aggression. The Security Council enjoys a large discretion to make these determinations in real situations.

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Although some scholars argue that complementarity regime does apply to SC referrals of situations to the Court in order to preserve the delicate balance which negotiators at Rome Conference tried to reach between the controversial wills for a Court enjoying complete independence and the necessity to confer the SC the power to refer situations to the Court. The preponderant opinion is that SC triggering mechanism abrogates the complementarity principle. This assumption can find strong evidence in some provisions in RS and the UNC, which grants great powers to the SC, namely the authority to confer jurisdictional primacy upon the Court.

To begin with, Article 18 provides that when a situation has been referred to the Court by a State Party or when the Prosecutor initiates investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court, and in case the Prosecutor has determined that there would be a reasonable basis to commence an investigation, he shall notify all States Parties and those States which would normally exercise jurisdiction over the crimes concerned.[18]The purpose of this notification is to give full effect to the complementarity regime to take place; that is to say, to allow national judicial orders to exercise jurisdiction-when able and willing- with respect to the crimes referred to in Article 5 of the RS, as a matter of fact, in accordance with the provisions contained in Article 17 relating to the issues of admissibility.

Notably Article 18 (1) omits any reference to situations referred by the SC pursuant to Article 13 (b). If that is the case, then the ICC would exercise automatic primacy as concerns investigations into such situations, although Article 19 would permit the State concerned or the defendant to challenge the admissibility of a specific case. Nsereko justifies the omission of Article 13(b) referrals by arguing, "the Council has primacy in matters involving international peace and security. Its decisions are binding on all States. Judicial proceedings are some of the measures that it may opt for as a means of maintaining or restoring international peace and security. Once it has opted for and sanctioned

[18] -See Articles 13 and 18 of the Rome Statute.

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such measures there is no need for further authorization from the Pre-Trial Chamber or from any other authority[19].

The SC is charged with the primary responsibility for the maintenance of international peace and security and is imbued with strong and broad powers under Chapter 7 of the UNC. These muscular powers stem from the failure of the League of Nations to prevent international conflict, a failure that in turn arises from the non-coercive enforcement powers of the League of Nations Council. The drafters of the UNC bore the failings of the League in mind as they set to work. Agreement between the great powers of the necessity of a strong, centralized body with coercive and far-reaching powers was achieved as early as the Dumbarton Oaks Conference in 1944. The delineations of this broad authority were debated at the San Francisco Conference[20].

In addition to Article 18(1) which suggests the exclusion of the complementarity regime from being effected in case of referrals from the SC, some UNC provisions seem to go in the same stream; disregarding this principle, which constitutes the cornerstone of RS. It appears that Articles 25, 48 and 103 of UNC grant the SC the authority to undermine the complementarity framework enshrined in the RS. Under Article 48(1) of the UNC "the action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security may determine". Article 25 encompasses the same meaning: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. Finally, Article 103 states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

An in-depth analysis of the three articles of the UNC demonstrates clearly that Members of the United Nations are supposed to abide by the SC resolutions, as a result, they are obliged to waiver the investigations

[19] -Mark Klamberg, Commentary on the Law of the International Criminal Court, Torkel Opshal Academic EPublisher, Brussels, 2017, p.220.

[20] - Harry Orr Hobbs, op.cit, pp. 38-39

Journal OF LEGAL STUDIES
International Academic and Scientific Review published semi-annually by the Laboratory of Sovereignty and Globalization - Yahia FARES University of MEDEA
ISSN 2437-0304
EISSN: 2602-5108
Dépôt légal: 2015-3039

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and prosecutions of cases for the benefit of the International Criminal Court, as no challenges to the jurisdiction or the admissibility of the case would be brought before the International Criminal Court[21]. It should also be noted that the aforementioned UNC articles are conflict-of-laws provisions asserting the preponderance of the UNC over RS., as they bind the Members of the UNO to give primacy to their obligations resulting from the Charter and require them to undertake the actions necessary for the implementation of the SC resolutions, particularly, when the resolutions are taken for the purpose of maintaining international peace and security.

So, read together these provisions appear to indicate that the Council does have the authority to abrogate the ICC's complementarity regime. Any Statute purporting to curtail the powers of the Council must necessarily be read down pursuant to Article 103. The Council's authority to confer jurisdictional primacy on international tribunals is unquestionable, and therefore a SC resolution rejecting the complementarity regime must be followed[22]; since Articles 25, 48 and 103 allow the SC to enforce its decisions and impose them without any serious challenges, as the states whether parties to the RS or not, are all essentially Members of the UN agencies, when the UNSC refers a case to the Court for investigation and prosecution, it involves the UN Member states. In other words, it involves the obligation to co-operate of both State Parties and states not party to the ICC[23]. In the same context, it is outlined that the drafters of the Charter styled their work a "Charter", thereby choosing a name, which denotes an especially elevated class of

[21] د. ساسي محمد فيصل، حدود تطبيق مبدا التكامل على ضوء العلاقات القانونية للمحكمة الجنائية الدولية، رسالة - مقدمة لنيل شهادة الدكتوراه في القانون العام، كلية الحقوق و العلوم السياسية، جامعة ابي بكر بلقايد، تلمسان، السنة الجامعية 2013-2014، ص 171,

[22] -Harry Orr Hobbs, op.cit, p. 40.

[23] -Zhu Wenqi, "On Co-operation by States not Party to the International Criminal Court", International Review of the Red Cross, ICRC, Volume 88 Number 861, 2006, 91.

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legal instruments. There is no doubt that in 1945 the term "Charter" was understood to be equivalent to "written constitution"[24].

B-Facts on the ground and practical applications demonstrate that the complementarity regime has been set aside and ignored following the SC referral by virtue of Resolution 1593 of the situation in Darfur (Sudan) since 1 July 2002 to the Prosecutor of the ICC, after taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur. Paragragh 2 begins with the verb "decides" to call upon the Government of Sudan and all other parties to the conflict, as well as all states to cooperate fully with the Court, and paragragh 8 invites the Prosecutor to address the Council within three months of the date of adoption of the resolution and every six months thereafter on actions taken pursuant to the resolution. It is clearly understood from resolution 1593 that the SC confers jurisdictional primacy upon the Court and decides that the latter conducts the proceedings and addresses reports to the SC. In addition, the Resolution does not include any indication to the complementarity regime[25]. Additional evidence that complementarity is kept away in case of SC referrals, appears in the twenty-ninth report of the Prosecutor of the International Criminal Court to the Security Council, in which the Prosecutor reported that her office continued to make progress in the investigations and was pursuing the job of gathering evidence and urged States to fully cooperate with the Court to arrest the alleged perpetrators. The Prosecutor underscored that full cooperation of States, including states not party to the Statute, was crucial for the Office to effectively achieve its mandate to conduct impartial, and effective investigations and prosecutions of crimes. She said that she relied on cooperation by States to gain entry to the territory where alleged crimes occur and to access evidence, witnesses, documents, forensinc and judicial records. The Prosecutor added that she was helpful that Sudan's political transition would result in a new chapter of positive cooperation, in which Sudan

[24] -Bardo Fassender, "The United Nations Charter as Constitution of the International Community", Columbia Journal of Transnational Law, Columbia Law School, 1998, p. 580

[25] -Security Council Resolution 1593, adopted by the Security Council at its 5158th meeting, on 31 March 2005.

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would comply with its obligation under UNSCR 1503 and cooperate fully with the Office and the Court. The statement shows clearly that The Prosecutor clings to the jurisdiction of the Court and holds firm to conduct the judicial proceedings with respect to the crimes occurring in Sudan[26].

Another evidence that the SC referrals abrogate the principle of complementarity, and that the latter is inconsequential in the event of the Security Council triggering mechanism; is the announcement made by the Sudan's ruling council that the country's deposed strongman, Omar El Bachir would be sent for trial on war crimes charges to the ICC[27].

Similarly, the SC unanimously referred the situation in the Libyan Arab Jamahiriya on 26 February 2011 to the ICC, since 15 February 2011, pursuant to Resolution 1970 (2011), following the violence and use of force against civilians, perpetration of gross and systematic violation of human rights, including the repression of peaceful demonstrators. The SC conferred jurisdiction to the Court when it decided that the "Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution (…) and urges all States to cooperate fully with the Court…". The Resolution invites the Prosecutor to address the Security Council on actions taken in the framework of the investigations and prosecution performed by the Court[28]. A complete and accurate reading of the Resolution indicates that the Security Council recognises the primary role of the Court to investigate and prosecute the case and is not concerned at all with the complementarity principle.

It is worth recalling that Libya is not a State Party to the Rome Statute; a thing which justifies the referral of the situation by the SC. The referral

[26] -The Office of the Prosecutor, International Criminal Court, Twenty-Ninth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005).

[27] - New York Times, Sudan's Ex-Ruler May Face War Crimes Trial, Official says, Feb11, 2020.

[28] -Security Council Resolution 1970 adopted by the Security Council at its 6491 meeting, on 26 February 2011.

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noted that the widespread and systematic attacks against the civilian population may amount to crimes against humanity, and murder, torture, cruel treatment and outrages upon personal dignity may amount to war crimes. The Prosecutor opened an investigation in March 2011; three suspects were identified as alleged perpetrators of the crimes pointed out above: Muammar Mohammed Abu Minyar Gaddafi, Saif-el-Islam Gaddafi and Abdullah El Senoussi. Three arrest warrants were issued against the three of them by the Pre-Trial Chamber of the ICC on 27 June 2011. It should be noted that the arrest warrant against Muammar Abu Minyar Gaddafi was withdrawn, on 22 November 2011, due to his death.

As regards the two others, the Libyan Transitional Government introduced an admissibility challenge before the Court, arguing that the authorities in Libya were willing and able to prosecute Saif Gaddafi and Al Senoussi before Libyan national courts. The admissibility challenge of Saif Gaddafi case was based on the principle of complementarity, however, Pre-Chamber 1 rejected the admissibility challenge on 31 May 2013 and reminded Libya of its obligation to surrender him to the Court because it determined that Libya was unable to genuinely carry out the investigation or prosecution against Saif Gaddafi. The Appeals Chamber confirmed the ruling on 21 May 2014. Unlike in the case of Saif Gaddafi, Pre-Chamber 1 decided that the Al-Senoussi case was inadmissible before the Court. The Appeals Chamber unanimously confirmed the Pre-Trial Chamber 1's ruling on 24 July 2014[29]. My assessment with regard to the Court's attitude pertaining to Saif Gaddafi and Al-Senoussi cases, is that: this is no more than unjustified double standard, and a sheer violation of the UNC provisions, namely; Articles 25, 48 and 103, in addition to Article 18 (1) of RS.

3-2.The Security Council Deferral Power and its Effect on Complementarity Framework

The power of the SC to defer ICC proceedings which is described in Article 16 of the RS was a highly problematic and contentious issue. Small states were suspicious of this power and wondered why would the Security Council need to defer ICC proceedings; they deemed it an

[29] -Oumar Ba, States of Justice : The Politics of the International Criminal Court, Cambridge University Press, Cambridge, United Kingdom, 2020, pp. 81-82.

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irrelevant interference of a political entity in judicially-related issues and could undermine the judicial mandate of the ICC. Other critics contended that if the Court was at the disposal of the Security Council, its credibility and independence would be at risk because of the politicization of the Court's judicial functions[30]. On the contrary, permanent States in the SC considered the power to defer the process initiated by the ICC is granted pursuant to Chapter 7 of the UNC, and finally, they succeeded in imposing it in the Statute. To fully understand the SC deferral power and its impact on complementarity, we will first focus on the content of the deferral power (**A**) and then, we will deal with the effect of this power on the ICC complementarity framework (**B**).

3.2. A-The Content of the Security Council Deferral Power

Beyond the power to refer a situation to the Court, Article 16 of the RS conferred the right to deferral to the Security Council, it 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 7 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".

The purpose from endowing the SC with the right to suspend the ICC's proceedings is to allow to resolve the issues brought before the SC within the ambit of the powers granted to this UN Organ under the auspices of UN chapter 7 to restore international peace and security through suspending the investigation or the prosecution for a period of time[31].

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[30] -Mr. Sadi (Jordan) said that it was not clear to him why the Security Council should be singled out, in preference to other United Nations Organs, as authorized to make referrals to the Court. Nor did he understand why the Council would need to request the suspension of an investigation for as long as 12 months. The Court should not become a mere appendage to the Council. United Nations Diplomatic Plenipotentiaries on the Establishment of an= International Criminal, Conference of Court, Rome, 15 June-17 July 1998, Official Records, Volume 2, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, p. 208.

[31]- موات مجيد، " موقف الولايات المتحدة الامريكية من المحكمة الجنائية الدولية "، مجلة الباحث للدراسات الأكاديمية، مجلة دولية محكمة نصف سنوية متخصصة في العلوم القانونية و السياسية، جامعة باتنة 1، كلية الحقوق و العلوم السياسية، العدد الثاني عشر، جانفي 2018، ص 393,

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Subjecting Article 16 to examination, one can observe that it suggests that there are some requirements which need to be featured in any deferral request. In making the deferral, the SC must be acting under Chapter 7 of the UNC; which means that it may not act without the situation first triggering the threshold language of UNC Article 39, that there be a "threat to the peace, breach of the peace, or act of aggression."[32]In accordance with Article 27 of the UN Charter, a resolution making an Article 16 request requires nine affirmative votes from members of the Security Council and the absence of a veto from any of the five permanent Members. Although the question remains open as to the likelihood of the ICC undertaking a separate assessment of the validity of a deferral request[33]. In my view, in virtue of the of UN Charter provisions; namely Article 39 and the requirements contained in Article 16 of RS, it is not, from the point of view of international law, available to the Court to check and assess whether the SC properly triggered the resolution under Chapter 7. Undoubtfully, it belongs exclusively to the SC to determine whether the threshold noted in Article 39 is met or not.

The second requirement relates to the validity period of the deferral request. Article 16 states that the deferral is valid for a period of 12 months and may be renewed by the Council under the same conditions. It's clear that the SC Permanent Members sought to have the upper hand when they imposed a renewable 12 months' period; this means from a theoretical point of view that any deferral request could be read literally to allow an infinite deferral as no indication is mentioned to the number of renewals and there is no one and no international entity that could put an end or limit the renewals. Others have a different point of view, they contend that at the expiration of the 12-month period, in order to renew the deferral request under the same conditions, the SC must once more gather and meet the requirements of the affirmative vote of nine members including the concurring votes or abstentions of the permanent Members on the grounds of a continued threat to peace and security which is a

[32] - Jenniffer Trahan, "The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices", Criminal law Forum, 2013, p.435. https://link.springer.com/article /10.1007/s10609-013-9213-9

[33] - Commentary on the Rome Statute of the International Criminal Court (Observers' Notes, Article by Article), Article 16, 2nd Edition, 28-06-2008.

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highly unlikely prospect, and it is made more improbable under the prevailing international relations characterized by constant disputes and disagreements over international issues between Russia, China on one side and the United States of America on the other side.

Besides the above aspects, Article 16 is described as dangerous and a genuine hurdle to ICC proceedings as it allows the suspension of investigations and prosecutions at any phase of the judicial process. The article commences with setting up a general principle whereby it is not permitted to the Court to commence or proceed with the investigation or prosecution. The provision is binding and clearly enshrines the power of prior and subsequent tutorship over the Court. Prior tutorship is expressed via "No investigation or prosecution may be commenced…"which results in an effective abrogation of Articles 13(a) and 15 of RS which allow a State Party or the Prosecutor proprio motu to refer situations to the Court. Whereas the subsequent tutorship appears via "No investigation or prosecution may be proceeded with…"[34].

B-The Effect of the Security Council Deferral Request on the Enforcement of the Complementarity Regime

Theoretically, with the suspension of commencement of investigation or prosecution, particularly in case of indefinite deferrals, the complementarity framework can never be triggered since the deferral mechanism prevents the Prosecutor from initiating investigations. With regard to suspending the prosecution when it is proceeded with, the Court could have triggered the admissibility mechanism, but because of the deferral request, complementarity is undermined, and thus, neither the Court nor the State concerned can exercise jurisdiction.[35]

In theory, Article 16 can delay the commencement of an investigation or prosecution for a period of 12 months. The admissibility criteria in

[34]- د. علي جمل حرب، القضاء الدولي الجنائي: المحاكم الدولية الجنائية، دار المنهل اللبناني للدراسات، بيروت، 2010، ص ص 515-517.

[35] - The subsequent tutorship results in halting the prosecution and a probable loss of evidence and documents, and witnesses may disappear or die; a situation which may generate a discontinuation of the prosecution, under these conditions, there is no way to raise the issue of complementarity.

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Article 17 indicates that the Court will exercise jurisdiction if the national courts are unwilling or unable. However, Security Council deferrals are not correlated to a condition of 'inaction' or 'unwillingness' or 'inability'. Article 16 can only delay the ICC jurisdiction by suspending an investigation or prosecution for a period of time (12) months. If the period is renewed continuously, and the conditions for a new resolution are met, then the ICC jurisdiction can be excluded for as long as it is necessary. Based on the above, the complementarity principle is de facto upset, although the admissibility criteria can still be fulfilled[36]. The permanent Members of the SC, by establishing the deferral request provision sought to assign a political card to the SC to hinder the ICC's complementarity framework pertaining to situations or crimes where their nationals or the nationals of their allies could be involved, thus potentially putting the prospect of justice on hold indefinitely.

The deferral request mechanism has only been effectuated once, through Resolution 1422, renewed by Resolution 1487. The Security Council determined that operations established or authorized are deployed to maintain or restore international peace and security under Chapter 7 of the UNC. Resolution 1422 requests that the ICC shall for a period of twelve-month period starting from 1 July 2002 not commence or proceed with investigation or prosecution, if a case arises involving current or former officials or personnel from a contributing State not Party to the RS over acts or omissions relating to a United Nations, and expressed the intention to renew the request under the same conditions for further 12 month-periods for as long as may be necessary, and decides that Member States shall take no action inconsistent with granting immunity from ICC prosecution to current or former officials or personnel serving or having served in UN peacekeeping operations, and no action inconsistent with their international obligations shall be taken.[37]

[36] -Nidal Nabil Jurdi, The International Criminal Court and National Courts: A contentious Relationship, Routledge Taylor & Francis Group, London and New YORK, 2016, p. 132.

[37]- Security Council Resolution 1422 adopted by the Security Council at its 4572ND meeting, on 12 July 2002.

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International Academic and Scientific Review published semi-annually by the Laboratory of Sovereignty and Globalization - Yahia FARES University of MEDEA
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It was clearly stated from the words and terms contained in Resolution 1422 that neither the ICC nor the national judiciary orders would be able to exercise jurisdiction with respect to a crime referred to in Article 5 of the RS, which means that the complementarity principle was hard hit and set aside in virtue of the above mentioned Resolution.

It is worth noting that outrage and frustration were expressed by many States and scholars following the undisguised and shameless political manipulation of Article 16 on the grounds that the article doesn't grant an absolute power to the SC, but it can exclusively be used to deal with a specific situation that is ongoing or that has already occurred.

4-Conclusion

This article has argued that at the heart of the Rome Statute is the idea that primacy is accorded to national criminal jurisdictions to conduct investigations and prosecutions of the most egregious crimes referred to in Article 5 of the Rome Statute, and the ICC is a Court of last resort; it seeks to complement domestic legal orders. It only steps in when the State which has jurisdiction over a case, is unwilling or unable genuinely to carry out the proceedings.

The article has explored whether the SC resolutions taken in virtue of Articles 13(b) and 16, and acting under Chapter 7 of the UN Charter can abrogate the complementarity regime. It has demonstrated that under SC referrals of situations to the Prosecutor of the ICC, and similarly, under the deferral requests of ICC proceedings pursuant to Chapter 7 of the UN Charter, the applicability of the complementarity principle is disregarded and precluded under Article 18 (1) which suggests that the ICC exclusively exercises jurisdiction over the crimes in case of referrals from the ICC on the basis of the theory of delegation of jurisdictional authority, and Articles 25 and 48 of UNC which clearly indicate that the SC decisions for the maintenance of international peace and security are binding for the Members of the UN. With respect to Article 103, it is clear that it is a valid legal basis suggesting that the obligations emanating from the SC resolutions have priority over conflicting RS obligations, and because of the broad powers vested in the SC, the latter can cancel the effect of complementarity by obliging the States to abstain from their own prosecutions.

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As regards the deferral request described in RS Article 16 granting the SC the right to defer ICC proceedings with no restriction on the number of times a request for deferral may be renewed, the study has shown that the enforcement of Article 16 results theoretically in hindering the effective pursuit of the ICC goals, hence, complementarity will not be effected, since the whole process can be indefinitely suspended.

With respect to complementarity, we suggest to introduce amendments allowing to give full effect to complementarity in case of referrals by SC only in post-conflict era and under a new political leadership. With regard to deferral request, my view is that it can help protect against large-scale atrocity crimes. As for the period, it should be renewed and made valid for a period of 12 months renewed once. An amendment should also be introduced through negotiated agreement to be approved by the Assembly of States Parties and the U.N.O granting the ICC the right to monitor if the SC resolution meets the Chapter 7 criteria, and at the expiration of the validity period, the proceedings should be resumed.