

## **INTERFERENCE OF SECURITY COUNCIL IN INTERNATIONAL CRIMINAL COURT\***

### **ABSTRACT**

The present article talks about the interference of the Security Council in the working of the International Criminal Court particularly in relation to triggering the jurisdiction of the International Criminal Court even against those states who are not parties to the Rome Statute and also deferring of a case for a year which is being tried by the same court. This interference of the Security Council in the working of International Criminal Court raises a fundamental question about the independency of the court which is the main focus of the article. The article concludes by giving alternative to this.

### **INTRODUCTION**

**“Power without Law is despotism. But the efficacy of the protection exercised by a judicial organ is, of course, in the last analysis always dependent on the support of the dominant part of the community.”<sup>1</sup>**

Many of the states refuses to sign the Rome Charter because of the reason that they are hesitant enough to recognize the amount of control that the Security Council exerciser over the functioning of the International Criminal Court (ICC). They are of the view that how a political organ like the Security Council can exercise control over judicial organ like International Criminal Court as it raises doubts about the independency of the International Criminal Court as they fear that it ultimately leads to ICC being controlled by few powerful nations of the World. Apart from that this also leads to a situation in which the ICC is being controlled by those States which are not even the members of the ICC. As the Relationship Agreement<sup>2</sup> acknowledges that

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<sup>1</sup> Kathleen Renee Cronin Furman, ‘The International Court of Justice and the United Nations Security Council: Rethinking the Relationship’, Columbia Law Review, Vol. 106 No. 2 (Mar 2006), p. 435.

<sup>2</sup> Negotiated Relationship Agreement between the International Criminal Court and the United Nations adopted on 4.10.2004 and came into force 22.07.2004

"the International Criminal Court is established as an independent permanent institution in relationship with the United Nations system".<sup>3</sup> A criminal court can only guarantee a fair trial when it cannot be pressured or manipulated by political, religious or other external powers. In a Rule of Law system the term "independent criminal court" should be considered tautological, even though it will ultimately always be functioning in a political context.

## THE ROME STATUTE AND THE ICC

### a. Establishment

In the modern time the traces of any International Criminal Court can be traced back to the establishment of the Tribunals in Nuremberg and Tokyo by the victors of the Second World War, to try those persons who are responsible for the war crimes, crimes against humanity etc. The Nuremberg Trial firmly established the principle that no one, no state, neither the head of State nor soldiers acting under apparently legal orders, has any right to violate the fundamental or the basic human rights.<sup>4</sup> This proved to be a stepping stone towards the formation of the International Court to try the Crimes against Humanity and War Crimes. In 1946, the United Nations General Assembly affirmed the principles of international law recognized in the Nuremberg Charter and Judgment. Afterwards, UN asked International Law Commission to study the possibility of creating a permanent International Criminal Court but it was rejected due to the differences of opinion among the states specially regarding the definition of crime of aggression. In the 20th century, the International Community reached consensus on definitions of genocide, crimes against humanity and war crimes. The international community was long aspired to the creation of a permanent international court since then.

In the 1990s after the end of the Cold War, the world witnessed the emergence of Ad-hoc tribunals in the form of International Criminal Tribunal for the former Yugoslavia<sup>5</sup> and for

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<sup>3</sup> Heikelina Verrijn Stuart 'UN and ICC Not the Easiest Relationship', Global Policy Forum.

<sup>4</sup> David Hirsh, Law Against Genocide Cosmopolitan Trials, Glasshouse Press, London p2

<sup>5</sup> ICTY and ICTR are created by the Security Council through its resolution 808 and 955 respectively

Rwanda<sup>6</sup>. The whole International community raises its voice against unacceptable impunity with consensus. But the legality of creation of these Tribunals were questioned on many grounds like whether the Security Council was mandated by framers of the charter to create a tribunal<sup>7</sup>. However, these tribunals were established to try crimes committed only within a specific time-frame and relating to a specific conflict and hence the need of a permanent body to take care of the crimes on the International Scenario was still alive.

On 17 July 1998, the international community reached an historic milestone when 120 States adopted the Rome Statute, which established the permanent International Criminal Court. The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty based, international court end impunity for the perpetrators of the most serious crimes of concern to the international community. `

b. Circumstances under which ICC can Exercise its Jurisdiction

The ICC's jurisdiction can be invoked by following means under the Rome Statute of International Criminal Court, 1998

- i. 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.<sup>8</sup>
- ii. 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.<sup>9</sup>
- iii. The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.<sup>10</sup>

c. The Role of Security Council Under Rome Statute :-

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<sup>6</sup> These Tribunals are created by the Security Council through resolutions under its chapter 7 power of the UN Charter.

<sup>7</sup> Robert Cryer, Prosecuting International Crimes, Selectivity and the International Criminal Law Regime, Cambridge University Press, New York, p. 225

<sup>8</sup> Art. 13(a) of the Rome Statute on International Criminal Court

<sup>9</sup> Art. 13(b) of the Rome Statute on International Criminal Court

<sup>10</sup> Art. 13(c) of the Rome Statute on International Criminal Court

Under the Rome Statute the Security Council is conferred some powers of referral and dereferral. However, these powers under the Rome Statute should be exercised by the Security Council keeping in mind the Chapter 7 of the UN Charter. These powers are as follows:-

- i. To decide whether a state act constitutes the crime of aggression for the purpose of Art. 5(2)<sup>11</sup> which posts a precondition to the exercise of Jurisdiction of ICC in case of crime of aggression.<sup>12</sup>
- ii. Security Council can refer a situation of the occurrence of a crime referred to in Art. 5 of the Statute to the Prosecutor under Art. 13(b) of the Statute.<sup>13</sup>
- iii. If Security Council, by a resolution adopted under Chapter VII of the UN Charter requests the ICC not to initiate the Investigation, then no investigation can be carried out for the period of 12 months from the date of passing of resolution. Security Council also has power to renew the suspension of investigation by another year if it thinks fit.<sup>14</sup>

Therefore, we can easily see that Security Council had enough powers under the Rome Statute through which it can easily interfere with the normal functioning of the International Criminal Court.

## **RELATIONSHIP BETWEEN SECURITY COUNCIL AND ICC**

After taking into consideration the Powers bestowed to Security Council under the Rome Statute one can easily arrive to the conclusion that the relationship between the Security Council and the International Criminal Court has not been free from the controversies. This relationship is not a result of Rome Statute only rather it has evolved in three stages.

### **1. Under the Draft Statute of International Criminal Court :-**

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<sup>11</sup> The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

<sup>12</sup> Though not expressly mentioned in Rome Statute, it is duty on part of Security Council under Art. 24 and Chapter VII of the UN Charter

<sup>13</sup> Ibid

<sup>14</sup> Art. 16 of the Rome Statute on International Criminal Court, Power of Derefferral

In Article 23 of the International Law Commission's 1994 Draft Statute for an International Criminal Court, it was stated that 1. The Court will have Jurisdiction with respect to the crimes referred to in Article 20<sup>15</sup> on referral by Security Council.<sup>16</sup> It further stated that the complaint of crime of aggression shall not be looked into by the Court unless Security Council has decided whether the alleged state has committed act of aggression or not.<sup>17</sup> Finally it denied the jurisdiction of the Court in cases which was looked into by the Security Council, except the Council decides otherwise. However nothing was said about the crimes which would be prosecuted before the ICC interfered with by the Security Council. Hence there was a reason to worry about the independence of the Court and fair trial, especially regarding the complaints relating to crime of aggression. This fear was proved to be materialistic in the first two years of establishment of ICC. In 2002 United States influenced Security Council to pass a resolution to exempt the US troops and officials from being tried for War Crimes by the ICC.<sup>18</sup> The exemption was renewed in the subsequent year using the veto power.<sup>19</sup> However because of the widespread outrage relating to the treatment of war criminal by the US in Iraq and Guantanamo Bay, Washington could not get the exemption renewed in 2004.<sup>20</sup>

## 2. Articles 5, 13(b) and 16 of the Rome Statute

By the plain reading of the Article 5 we cannot find there any role for the Security Council or any link between the Security Council and ICC, but the link between political and judicial organ can be traced by reading Art. 5 of the Rome Statute along with Art. 39 of the UN Charter. Art. 5 mention the jurisdiction of the ICC in case of four crimes viz. genocide, crimes against

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<sup>15</sup> (a) The crime of genocide,(b) The crime of aggression,(c) Serious violations of the laws and customs applicable in armed conflict,(d) Crimes against humanity,(e) Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

<sup>16</sup> Art. 23(1) Draft Statute for ICC

<sup>17</sup> Art. 23(2) Draft Statute for ICC

<sup>18</sup> Security Council Resolution 1422, July 2002

<sup>19</sup> Security Council Resolution 1487/ 2003.

<sup>20</sup> Refer to <http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-in-the-security-council-6-4.html>

humanity, war crimes and aggression.<sup>21</sup> However according to Art. 24 of the UN charter Security Council will be primarily responsible for the maintenance of International Peace and Security.<sup>22</sup> Art. 39 of the Charter empower the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression.<sup>23</sup> Hence Art. 5 of Rome statute read in light of Art. 24 and 39 of the UN Charter gives a power to the Security Council to decide whether ICC can exercise jurisdiction over the crimes mentioned in the Art. 5, especially the crime of aggression.

While discussing the Individual Criminal Responsibility and role of Criminal Justice, Vera Golland Debbas states:

*The link established between threats to international peace and security and the core crimes giving rise to individual criminal responsibility under international law was also underlined by the Security Council in establishing the International Criminal Tribunals for Yugoslavia and Rwanda. Criminal justice has therefore been seen as one means of contributing to the restoration and maintenance of peace and the Statute of the International Criminal Court adopted in Rome in July 1998 sustains this linkage in its preamble, in "recognizing that such grave crimes threaten the peace, security and well-being of the world".<sup>24</sup>*

Despite of having its treaty basis ensuring its independence, ICC will always have its formal relationship with Security Council or UN as a whole. Under the Rome Statute, Security Council plays a complementary role to ICC as the Statute bestows the function of institutionalizing the criminal responsibility on Security Council as mentioned earlier. However, in doing that, Security Council has the most number of encounters with the Jurisdiction of the ICC, especially when it comes to determining whether the Act of state is of aggression or not for the purpose of Article 5 of the Rome statute.

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<sup>21</sup> Ibid

<sup>22</sup> Art. 24(1) of the UN Charter

<sup>23</sup> Art. 39 of UN Charter runs as :- 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.

<sup>24</sup> Vera Golland Debbas, The relationship between ICC and Security Council, Global Policy Forum , <http://www.globalpolicy.org/component/content/article/164/28588.html>

## 2.i. The Crime of Aggression and relationship between Security Council and ICC

ICC, in order to exercise its jurisdiction in case of crime of aggression<sup>25</sup>, must do so once the provision defining the crime and the conditions relating to the exercising the jurisdiction are once incorporated<sup>26</sup>. However, such conditions should be consistent with the UN Charter. U.N. organs have assigned the function of determining the aggression specifically to the Security Council the reason being aggression is one of the preconditions for Security Council to perform its functions under Article 39 of the UN Charter.<sup>27</sup> Giorgio Gaja in the book 'The ICC and the Crime of Aggression' (Compilation of the papers presented in Second International Conference on ICC held in 2001, by Mario Politi and Giuseppe Neesi ) argue :-

*Under the Charter the Security Council has been given an exclusive power to take a decision on existence of aggression but it nowhere says that its finding will be binding also for a treaty body entrusted with the repression of Individual Crimes. Any such binding effect is not required under Article 103<sup>28</sup> of the UN Charter or Article 5(2)<sup>29</sup> of the Rome Statute. It is only one of the ways in which the relationship between the two can be established.*

However after reading the bare text of Article 103 of the UN Charter the binding nature of the findings of Security Council is obvious. A case in which crime of aggression is determined and referred to ICC<sup>30</sup> by the Security Council, ICC will have to prosecute the alleged.

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<sup>25</sup> The criminalization of aggression directly affects state sovereignty, and thus it is not surprising that both the crime of aggression and the requirements for criminal prosecution before the International Criminal Court were extremely controversial at the negotiation on the ICC Statute.

<sup>26</sup> Antonio Cassese, International Criminal Law, Oxford University Press, New York, p110

<sup>27</sup> Mario Politi and Giuseppe Neesi, The ICC and the Crime of Aggression, p. 123

<sup>28</sup> Article 103 of UN Charter runs as - 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.

<sup>29</sup> Ibid

<sup>30</sup> Referral – Article 13(2) of the Rome Statute.

The preparation of the definition of Crime of aggression is been entrusted with the preparatory commission of the International Criminal Court.<sup>31</sup> The Three primary concerns in regard to this, as I have indentified, are

- a. Definition of Aggression
- b. Element of the crime of aggression
- c. Conditions under which ICC should exercise its Jurisdiction

The definition of the crime of aggression is defined in the international instruments. General Assembly Resolution 3314<sup>32</sup> defines some acts as the crime of aggression.<sup>33</sup> However that definition suffers from many drawbacks. Not all the acts, which can be responsible to constitute the crime of aggression, are taken into consideration in the definition. The definition only emphasizes on the state action to initiate crime of aggression. It overlooks the individual or Non-state Institutional responsibility.

The argument referred above says that the Security Council has exclusive power under Article 39 of the UN Charter. However the binding effect of the decision taken in pursuance of that power is now out of question. But one can argue that the power of Security Council under Art. 39 is not an absolute one. Given a hypothetical situation there is possibility of the Permanent Members of the Council will not be able to take a unanimous decision. In such a case, the Uniting for Peace Resolution, 1950 provides that the General Assembly shall consider the matter immediately.<sup>34</sup> This resolution has been invoked on several occasions by the General Assembly. Even the Security Council itself has called for Special Sessions of General Assembly by invoking the Resolution.<sup>35</sup> Hence, Article 39 imposes a primary responsibility on the Security Council instead of granting an Exclusive Power.

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<sup>31</sup> Resolution F adopted by Rome Diplomatic Conference on July 17, 1998

<sup>32</sup> Adopted in 1974

<sup>33</sup> Sec. 2 of GA Resolution 3314

<sup>34</sup> GA Resolution 377 (V), 1950

<sup>35</sup> On the Suez Canal Crisis (S. Resolution 119, 1956), Lebanese Crisis (S. Res. 129, 1958), Hungarian Crisis (S. Res. 120, 1956), Congo Problem (S. Res. 157, 1960), Bangladesh Problem (S. Res. 303, 1971), Intervention in Afghanistan (GA Res. ES 6/2, 1980)



Even though in Nicaragua Case<sup>36</sup>, The ICJ deciding upon the binding nature of the considerations taken by the Security Council, said that it has the binding nature, Judge Schwebel dissented the opinion saying that the Security council may take legal considerations but it is not bound to apply them like a Court.

2.ii. Article 13(b)(referral) and Article 16 (derefferral) :

Under the Rome Statute, the Council has been given powers of referral and deferral in respect of Court proceedings and a potential role in the determination of the crime of aggression. It has also been enlisted as an enforcement mechanism in ensuring the cooperation of States with the Court. Even though descending the opinion is regarded as a highly relevant remark.

With regard to powers of referral, the Rome Statute retains the provision of former Article 23(1) under which the Council had the possibility of triggering the Court's exercise of jurisdiction. Under Article 13(b) of the new Statute, the Council can, acting under Chapter VII, refer to the Prosecutor "a situation in which one or more of such crimes appears to have been committed". This introduces a collective triggering mechanism parallel to that exercised unilaterally by States parties<sup>37</sup> or by the Prosecutor<sup>38</sup> and is intended to avoid the establishment of ad hoc tribunals by the Council.<sup>39</sup>

ICC does not have universal jurisdiction under the article 12 of the Rome Statute as it restricts the ICC to try those cases only which are referred to it by the member states for which the place of crime and the nationality of the criminal should be associated with the member states. Therefore, provision of referral by Security Council under Article 13(b) also has important implications on State consent as under it the Security Council may refer any situation to the Prosecutor irrespective of whether it involves the territory or nationals of a State party. This allows the Council to initiate a process leading to the

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<sup>36</sup> ICJ Reports, 1986, p. 290

<sup>37</sup> Article 13(a) of the Rome Statute

<sup>38</sup> Article 13(c) of the Rome Statute

<sup>39</sup> <http://www.globalpolicy.org/component/content/article/164/28588.html>

prosecution of individuals who have committed a crime on the territory of, or who are nationals of, States which are not parties to the Statute, and in the absence of those States' consent, which has happened in case of Darfur Crisis. And also keeping in mind the political nature of the Security Council, and the existence of the veto power, means that some states especially the permanent members of the Security Council will be protected by the referral.

As for the Council's power to defer investigation or prosecution, had Article 23(3) of the ILC Draft Statute been adopted, it would have constituted the most extensive reach of the Council's creeping jurisdiction in the field of international criminal law by allowing it, in a situation being dealt with under Chapter VII as a threat to or breach of the peace, to bar the commencement of a prosecution by the Court until the Council decided to allow it to proceed.<sup>40</sup> This implies that the permanent member can have the power to potentially control the jurisdiction and independency of the ICC. Under this section a political body had given the authority to stall the investigation or prosecution of offences for reasons which need not to do anything with the administration of justice for as long as the Council is prepared to vote for such a resolution As it was rightly put up by Sir Franklin Berman, head of the UK delegations at Rome, who accepts that Article 16 is a '*departure from pure principle*'<sup>41</sup>. This was clearly illustrated in the open-ended nature of the sanctions adopted against Iraq. These all are related to the Council's power under Article 39 of the UN Charter. However, this provision has substantially been altered as a result of a proposal by Singapore, combined with a Canadian amendment.<sup>42</sup>

#### Article 16 of the Rome Statute

"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the

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<sup>40</sup><http://www.globalpolicy.org/component/content/article/164/28588.html>

<sup>41</sup> Robert Cryer, *Prosecuting International Crimes, Selectivity and the International Criminal Law Regime*, Cambridge University Press, New York, p. 227

<sup>42</sup> *ibid*

Court to that effect; that request may be renewed by the Council under the same conditions."

The situation has therefore been reversed as this provision underlines certain safeguards to the absolute control which Security Council could have exercised on ICC.

- a. For dereferring a crime to the ICC, the Security Council must act affirmatively on the basis of a resolution requesting the Court to defer its investigation. This implies that the Council will have to obtain the consensus of all five permanent members of the Council in any effort to take away a matter which is pending before or is under the investigation by the Court.
- b. The temporal time limit acts as an additional safeguard. Even though it is subject to renewal, it will again require a Unanimous Resolution by the permanent members of the Council.
- c. Since the resolution is one adopted under Chapter VII, there must presumably be a prior determination under Article 39, the prerequisite for any action. This leads to speculation as to what would then have to constitute the threat to or breach of the peace. Hence, Security Council can be questioned for its action.

These safeguards have attenuated some of the concerns expressed in Rome that the previous provisions considerably undermined the independence of the Court by allowing for extensive control by a political organ. Yet as was clearly stated by several delegations on a number of occasions, the Statute itself cannot affect the powers of the Council under the Charter. By virtue of the operation of Article 103<sup>43</sup> of the UN Charter, the Council, were it to adopt a mandatory resolution under Chapter could still bypass existing treaty mechanisms for the prosecution of individuals in the sense that Member States'

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<sup>43</sup> Article 103 of UN Charter runs as - 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

obligations under the Charter would have to prevail over those under the ICC were these to conflict.<sup>44</sup>

Heikelina Verrjin Stuart, in her article, UN and ICC not the easiest relationship<sup>45</sup> states that In Rome, Article 16 was a clever compromise between the states who wanted an independent prosecutor and the US wanting to control the prosecutor through the SC. It was only meant to curb the prosecutor if his actions would, in exceptional circumstances, be considered a threat to international peace and security, not to push political interests of UN member states and not to be the basis for a kind of conditional referral, or a referral under threat of a deferral. Article 16 has certainly never been imagined as a tool in the hands of the SC to suspend an investigation or prosecution based on a referral by the SC itself.

### 3. Control Over The ICC Prosecutor :-

The question who exercises the control over the prosecutor can be answered in light of the approach by the UN legal affairs office towards the ICC in the Lubanga case.<sup>46</sup> It might prove to be even more disruptive than the political machinations within the Security Council. The refusal by the UN to make disclosure of exculpatory evidence in material provided by the UN troops in Congo possibly goes to the heart of the daily procedures at the ICC. The ICC Statute gives room in Article 54[3(e)]<sup>47</sup> for non-disclosure of documents obtained on the condition of confidentiality and solely for the purpose of generating new evidence. The Office of the Prosecutor has, certainly in the first investigations in DRC, widely and routinely collected evidence from the UN troops, MONUC, and NGOs, who understandably wanted to protect their people on the ground. The ICC judges have spoken critically about this blanket agreement, holding the

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<sup>44</sup> <http://www.globalpolicy.org/component/content/article/164/28588.html>

<sup>45</sup> UN and ICC not the easiest relationship, Article by Heikelina Verrijn Stuart, Global Policy Forum.

<sup>46</sup> 26 Jan 2009, The first case tried by the ICC against Lubanga, Republic of Congo

<sup>47</sup> Article 54[3(e)] runs as : The Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents

prosecution responsible for not doing their job. The letter of 20 June 2008, written by the UN under Secretary-General for Legal Affairs at the time, Nicholas Michel, proposed that the judges of the Lubanga Trial Chamber would be allowed to read the documents, not at their ICC offices but at the Peace Palace. They would not be allowed to take notes, make copies or any other form of written or verbal record. Notes to the files were allowed to be taken outside the room only. Understandably the TC was irritated and stayed the proceedings just ten days before the trial would have started.<sup>48</sup>

## CONCLUSION

Although it seems that the relationship between the Security Council and the ICC under the Rome Statute is complementary, yet, the Council exercises high authority over certain affairs of the Court. The Security Council interferes with the independency of the ICC by imposing its authority in some matters. The most potent weapon for this purpose in the hand of the Security Council is the Article 103 of the UN Charter which poses the Charter above all treaties privately entered into by the Member States. Hence the Article 39 of the UN Charter will always be overriding the provisions of the Rome Statute. However as established earlier, Article 39 does not give any exclusive power to the Security Council but imposes a primary duty. This is why it is important that the reference to "the relevant provisions of the Charter" in Article 5(2) of the Rome Statute be clearly interpreted in the light of United Nations practice. As the International Court of Justice has classically stated, that primary does not mean exclusive responsibility in matters of international peace and security. The Security Council has itself assumed the competence to define aggression (admittedly without authoritative force), and the International Court of Justice, another principal organ of the United Nations, has not considered itself debarred from a case in which aggression was alleged which means that it can also reach its own separate qualification of such acts, even after a determination has been reached by the Council under Article 39.<sup>49</sup> Options involving a qualification by the General Assembly or the ICJ where the

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<sup>48</sup> UN and ICC not the easiest relationship, Article by Heikelina Verrijn Stuart, Global Policy Forum.

<sup>49</sup> Nicaragua Case, ICJ Reports, 1986, p. 290

Council fails to make such a determination or remains inactive are effectively being examined within the Preparatory Commission, in addition to one which would allow the Court to proceed after a stipulated time limit.

In case of Defining the Crime of Aggression there are three suggestions.

- a. The UN General Assembly can decide whether the act committed by a State constitutes a Crime of aggression<sup>50</sup>
- b. The ICJ, as it has done in Nicaragua Case can decide whether the concerned act constitutes Aggression or not.
- c. The ICC should be given power to decide on the question itself after the definition of Aggression been adopted. It need not be necessarily adopted by the Security Council as Article 5(b) nowhere specifically mentions Security Council.

With regards to the powers of Referral and Derefferral, there exist enough safeguards under the interpretation that I have followed in the paper. However in case of Derefferral and its extension, the decision of the Security Council must be put to vote in General Assembly and there should be prerequisite that such decision must be supported by two third members of the UN. This will act as a check on abuse of power by the Security Council.

It is now the time to reevaluate the present relationship between the Security Council and the International Criminal Court keeping in mind the on-going efforts at the international level to put restraints on the power of the Security Council and also to put it under some sort of accountability, to provide for some form of accountability, to ensure a more equitable representation within that body, and most important where necessary, to allow the United Nations General Assembly to reassert its residual role in the field of international peace and security. However in order to maintain the Independency and ensuring fair trial by the Court the UN organs must strictly follow the Relationship agreement<sup>51</sup> in the strict sense. The pressure of

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<sup>50</sup> Refer to footnote 28

<sup>51</sup> Negotiated Relationship Agreement between the International Criminal Court and the United Nations adopted on 4.10.2004 and came into force 22.07.2004

International Community also plays an important role in controlling the trigger of the Security Council over ICC. However, due to diplomatic relationships, no International Unanimity in a particular case can be achieved.

## **BIBLIOGRAPHY**

### **1. International Instruments :-**

- a. United Nations Charter,
- b. Rome Statute of the International Criminal Court
- c. General Assembly Resolutions and agreements –
  - i. GA Resolution 377 (V), 1950
  - ii. Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 2004
- d. Security Council resolutions
  - i. Security Council Resolution 1422, July 2002
  - ii. Security Council Resolution 1487/ 2003.
  - iii. Security Council Resolution 1706, 2006
  - iv. Security Council Resolution 1769, 2006

### **2. Books**

- a. Politi.Mauro ,and Giuseppe Nesi The International Criminal Court and the Crime of Aggression, Ashquate Publishing Ltd
- b. Sands. Philip. From Nuremberg to the Hague : The future of International Criminal Justice,Cambridge University Press

- c. Schabas. William A, An Introduction to the International Criminal Court, Cambridge University Press
- d. Hirsh.David Law Against Genocide Cosmopolitan Trials, Glasshouse Press, London
- e. Cryer.Robert Prosecuting International Crimes, Selectivity and the International Criminal Law Regime, Cambridge University Press, New York.
- f. Cassese. Antonio, International Criminal Law, Oxford University Press, New York

3. Articles :-

- a. The Relationship Between ICC and Security Council, Vera Golland Debbas, , Global Policy Forum
- b. UN and ICC not the easiest relationship, Article by Heikelina Verriijn Stuart, Global Policy Forum
- c. Kathleen Renee Cronin Furman, 'The International Court of Justice and the United Nations Security Council: Rethinking the Relationship', Columbia Law Review, Vol. 106 No. 2 (Mar 2006)