NEW VOICES IN INTERNATIONAL LAW: MAKING INTERNATIONAL CRIMINAL LAW MORE EFFECTIVE

This panel was convened at 12:45 pm, Friday, April 11, by its moderator, Gabrielle Kirk McDonald of the International Criminal Tribunal for the former Yugoslavia and the Iran-U.S. Claims Tribunal (retired), who introduced the speakers: Adejoké Babington-Ashaye of the World Bank Administrative Tribunal; Saira Mohamed of the University of California at Berkeley School of Law; and Maria Varaki of Hebrew University.[*]

Politicizing the International Criminal Court: Redefining the Role of the United Nations Security Council in the Age of Accountability

By Adejoké Babington-Ashaye[†]

The UN Security Council plays a prominent role in the functioning of the International Criminal Court (ICC). Although the ICC is a judicial institution distinct from the UN system, the Security Council, through provisions in the ICC's governing treaty (the Rome Statute), can refer situations to the ICC Prosecutor for investigations or prosecutions. This power, contained in Article 13(b) of the Statute, enables the Council to transcend the nationality and territoriality pre-conditions necessary to trigger the Court's jurisdiction. Through Article 16 the Security Council can prevent the initiation or continuation of investigations or prosecutions for a renewable period of 12 months following the adoption of a resolution under Chapter VII of the UN Charter. In exercising its referral and deferral powers, the Security Council must act under Chapter VII of the Charter, specifically Article 41, which provides that the Council may decide what measures not involving the use of force are to be employed to give effect to its decisions. Between June 2002 and April 2014, the Security Council expressly invoked its deferral powers on three occasions and referred two situations to the Prosecutor: Darfur (2005) and Libya (2011).

In this paper I will consider the arguments that this relationship between the ICC and the Security Council has become politicized. I will review the drafting history of the Rome Statute to assess how this relationship was originally envisioned and whether the political undertones of such a relationship were apparent. I then will consider how the Council has applied its powers. Finally I will propose recommendations to redefine the relationship to improve the Court's effectiveness, with particular emphasis on the Prosecutor's discretionary powers under Article 53 of the Rome Statute.

Ideally a relationship between the ICC and the UN Security Council would serve multiple interests. In drafting the Rome Statute, the International Law Commission (ILC) considered that since the UN Charter confers upon the Council primary responsibility for the maintenance of international peace and security, referral powers would provide the Council with a standby permanent tribunal through which it could adopt international criminal justice as a means of fulfilling this mandate. Upon review of the *travaux préparatoires,* the political undertones of such a relationship were apparent throughout the drafting phase of the Rome Statute. Concern was frequently expressed by delegates that the Court's activities could be affected

[*] Professor Mohamed did not submit a research paper for the *Proceedings*.

[†] World Bank Administrative Tribunal.

https://doi.org/10.5305/procannmeetasil.108.0301 Published online by Cambridge University Press

by political decisions taken in other forums. Such a relationship, it was argued, could introduce into the Rome Statute a substantial inequality between states members of the Security Council and those who were not members, and between permanent members who hold veto powers and other states. It appears that the possibility that the Security Council's relationship with the ICC may become politicized was implicitly accepted.

The Council has since used its referral and deferral powers in a manner which confirms the political nature of its relationship with the Court. The three deferral resolutions were adopted between 2002 and 2003 at the behest of the United States, a permanent member of the Security Council, to protect peacekeepers who are nationals of nonstates parties to the Rome Statute. The legality of these deferral resolutions purportedly adopted pursuant to Article 16 is questionable. The Security Council must act under Chapter VII on behalf of all UN members in invoking its deferral powers. Chapter VII first requires a determination under Article 39 of the Charter that a threat to peace, breach of peace, or an act of aggression has occurred. Only then can the Council decide, pursuant to Article 41, which measures to adopt. Such a determination was not made. Although some argue that a formal determination under Article 39 is not necessary, I am of the view that a situation necessitating deferral of investigations or prosecutions must at the very least objectively exist. In all three resolutions, no such situation existed. As was clearly stated by the European Union, neither peacekeeping nor the ICC constitutes a threat or obstacle to peace.

Regarding the referrals, three common features raise questions about the manner in which referral powers have been used. While most welcomed the referral of the situations in Darfur and Libya, many were concerned by (1) limited mandated state cooperation; (2) exclusion of financial responsibility for any investigations and prosecutions carried out by the Prosecutor; and (3) exclusion of the Court's jurisdiction over nationals of nonstates parties. These common features, which were tailored to protect U.S. political interests, have greatly affected the Court's effectiveness. State cooperation and financial resources are essential to international criminal justice. In excluding financial responsibility for situations it referred, the Security Council shifted the obligation to member states of the Court, which is under financial constraints. The Security Council has enjoyed two ''free rides'' despite Article 115 of the Statute, which states that the General Assembly may approve disbursement of UN funds in relation to the expenses incurred due to referrals by the Security Council.

Instead of providing the Court with universal jurisdiction as many hoped, the relationship between the Court and the Council has, on the contrary, negatively impacted the Court's ability to dispense justice properly. Since the adoption of these resolutions, the Security Council has failed to provide the requisite support to ensure that states execute outstanding arrest warrants. In 2011, China, a permanent member of the Council, hosted President Al-Bashir of Sudan, who is accused of genocide, war crimes and crimes against humanity. Accepting such a state visit confirmed the belief that the Security Council was unlikely to take serious steps to enforce outstanding arrest warrants.

Likewise, the referral of the situation in Libya could be considered a *''détournement de procedure,''* punitive and politically motivated rather than a genuine recourse to the Court. The referral formed part of a litany of sanctions against the Gaddafi regime. Had Gaddafi and other Libyan leaders accepted several compromises offered, it is unclear that the situation would have been referred to the ICC notwithstanding reasonable grounds to believe that crimes under the Court's jurisdiction were committed. That the Security Council perceived the referral as an end in itself is apparent from the fact that, less than a month later, military

intervention in Libya was approved, and the Council has remained passive as challenges to the admissibility of the cases unfold.

Redefining the relationship between the Court and the Security Council is essential to improving the perception of both institutions and the effectiveness of the Court. Until there is universal ratification and implementation of the Rome Statute, there continues to be a need for a third party with powers to bind states to have recourse to the Court. The problem is not with Articles 13(b) and 16 per se, but rather with the opaque and unequal manner in which it has been applied and the undemocratic nature of the Council. As a result of the Council's politics, ''accountability free-zones'' have been created where deserving situations, such as the situation in Syria, have not been referred to the Court, and regimes are protected by permanent members of the Council.

I propose therefore that the ICC take charge of the dynamics of its relationship with the Security Council by, on the one hand, building its own political authority through the Assembly of States Parties and, on the other, the use of prosecutorial discretionary powers with respect to Security Council referrals. The Prosecutor is legally entitled under Article 53 of the Statute to determine, in the interest of justice, not to initiate investigations or prosecutions notwithstanding the admissibility of the situation and the existence of reasonable grounds to believe a crime has been committed.

Although the term ''interests of justice'' is not novel in domestic jurisdictions, it is neither defined in the Rome Statute nor elaborated in the *travaux préparatoires*. Furthermore, discourse in international criminal justice scholarship has largely focused on the peace versus justice debate, offering a narrow interpretation of the ''interests of justice.'' I believe that a broad view of this term is more consistent with the purpose of its inclusion in the Rome Statute. That the Prosecutor may decline to initiate investigations or prosecutions in the interests of justice is recognition that justice in this sense is much broader than criminal or retributive justice. Since ongoing peace negotiations are not the only viable challenge to the initiation of investigations or prosecutions in the international sphere, this concept is certainly broader than the peace versus justice debate.

In 2007, the Office of the Prosecutor issued a policy paper on the interests of justice, which noted that guaranteeing lasting respect for international justice may be a significant touchstone in assessing the interests of justice. I believe this to be an appropriate lens through which the interests of justice, particularly in the context of Security Council referrals, can be considered. This statement recognizes that certain action or inaction could bring the administration of justice into serious disrepute. It is in the interest of justice that justice is not only done but is also perceived as being done.

In the context of Security Council referrals I propose some elements that the Prosecutor could consider in determining whether an investigation or prosecution would be in the interests of justice. These include: (1) the availability of financial resources to embark on detailed and thorough investigations; (2) access to forensic and other necessary evidence; (3) the level of cooperation expected from the Council; and (4) the ability to access and protect witnesses and other sources of information. The ability to protect victims and witnesses is particularly important in the context of cases arising from Security Council referrals and remains a grave concern in the Darfur situation. To date, Security Council referrals have concerned states which are nonstates parties to the Rome Statute and are to varying degrees hostile to the ICC's exercise of jurisdiction over the crimes and the alleged perpetrators. The referrals have also concerned situations of ongoing instability. This has a significant impact

on the Court's ability to access in-country witnesses as well as fulfill its Article 68 obligation to protect witnesses.

There is scope for the ''interests of justice'' concept to be developed further, particularly with respect to Security Council referrals which are primarily political in nature. Greater reflection by the Prosecutor on whether all Security Council referral resolutions, especially those adopted with the limitations and exclusions discussed earlier, serve the interests of justice is important. This would enable the Prosecutor to be independent and to maintain the perception of political independence from the Security Council. At present, concern has been expressed over the speed at which the Office of the Prosecutor has launched investigations following the two Security Council referrals. In 2011, the Prosecutor launched the Libya investigation within days of receiving the referral—a record with regards to any of the investigations conducted by the Prosecutor's Office.

Although a decision not to proceed with investigations or prosecutions in the interests of justice is discretionary, such a decision is subject to appropriate review by the Pre-Trial Chamber pursuant to Article 53(1) of the Rome Statute. This oversight function prevents arbitrariness. The Pre-Trial Chamber would ensure a balance between the interests of justice and the Prosecutor's obligation or expectation to investigate and prosecute every situation referred.

The process of concluding multilateral treaties is steeped in politics and the individual interests of the states involved. Diplomacy and compromise are central to the success of a treaty regardless of its subject matter. As William Schabas wrote, ''At the international level policy and politics seem to sit much closer to the centre of the justice agenda.''[1] The Security Council operates within the political domain, and the ICC is required to function in this context. This recognition should cause neither fear nor alarm, but rather should result in the Court, particularly the Office of the Prosecutor, taking charge of the dynamics of the ICC-Security Council relationship.

Effectiveness Considerations Between Legitimacy and Prosecutorial Discretion

By Maria Varaki[*]

Following its adoption in 1998, the Rome Statute[1] was characterized by the then UN Secretary General as ''a gift of hope for future generations.''[2] Twelve years later, the current Secretary General of the United Nations reiterated this belief, stating that the ''[t]he Rome Statute represents the best that is in us, our most noble instinct . . . the instinct for peace and justice.''[3] Despite this initial triumphant acceptance, the Court and in particular the Office of the Prosecutor (OTP) has completed its first decade of operation, being subjected

[1] William Schabas, Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals 3 (2012).

[*] Researcher, Hebrew University, Faculty of Law.

[1] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[2] Kofi Annan, Former Secretary General of the United Nations, Address at the Rome Conference (July 18, 1998).

[3] The Secretary General, Address at the Review Conference on the International Criminal Court Kampala: An Age of Accountability (May 31, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-BanKi-moon-ENG.pdf.

https://doi.org/10.5305/procannmeetasil.108.0301 Published online by Cambridge University Press