



The UN Security Council and the International Criminal Court

Towards a More Principled Relationship

LAWRENCE MOSS

March 2012

- The UN Security Council's power to refer potential prosecutions to the International Criminal Court (ICC) in situations outside the Court's treaty-based territorial and nationality jurisdiction helps deter the perpetration of genocide, war crimes and crimes against humanity everywhere in the world.
- It is unclear if referral to the ICC has had any effect in preventing the commission of further crimes in Darfur or Libya, and referral was no substitute for the Council's use of other measures to restore peace and security. The Council should use referrals to ensure accountability for serious crimes, and to strengthen the general deterrent effect of international criminal law, rather than as a primary tool to address breaches of the peace.
- The composition of the Security Council, the veto power of its permanent members, and its need to fashion immediate remedies in crisis situations can endanger the independence and legitimacy of the ICC, particularly if the Council's decisions are seen as politically motivated. In using its power of referral, the Council should apply criteria and processes that are as objective and consistent as possible.
- The Council should respect the independent judicial process by persevering in its reluctance to defer any investigation once underway. The Council should use its powers of enforcement to support all ICC investigations in Chapter VII situations. The Council should no longer usurp the decisions of the General Assembly as to funding investigations referred by the Council to the ICC.



Contents

1. Different Mandates of the Security Council and the ICC	2
2. Security Council Powers under the Rome Statute	3
3. Inherent Concerns for the Security Council's Role in the Statutory Scheme	4
4. Initial Abuse of the Power of Deferral	4
5. Lessons from the Darfur Referral	4
5.1 Sound Basis for the Referral	5
5.2 The Flawed Referral Resolution	5
5.3 A Deterrent to Further Crimes, or an Obstacle to Restoring Peace?	6
5.4 A Divided Council Declines to Defer Prosecution	7
5.5 Inadequate Support for the Court's Work	7
6. Lessons from the Libya Referral	8
6.1 Credible Evidence but a Truncated Process for Referral	8
6.2 Again, a Flawed Resolution	9
6.3 A Court Abandoned?	10
6.4 A Deterrent to Further Crimes, or an Obstacle to Restoring Peace?	10
7. The Security Council Declines to Defer Kenyan Investigation	10
8. Failure to Refer Other Grave Situations	11
9. Relationship at a Crossroads	12
10. Some Specific Suggestions Regarding ICC Referrals by the Security Council	13

1. Different Mandates of the Security Council and the ICC

The Security Council is the UN's primary and most powerful organ for carrying out the UN's central mission of keeping peace in the world. Article 1 of the UN Charter lists as the organization's first Purpose:

»To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.«

It is with this primary purpose in mind that the great powers of 1945 were given permanent seats on the Council under Article 23 of the Charter as those countries best able to perform this central role. As criteria for electing the non-permanent members of the Council (six in 1945; ten since amendment of the Charter in 1965), the General Assembly was directed to specially pay »due regard (...) in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes« of the UN.

Article 24 of the Charter grants the Council »primary responsibility for the maintenance of international peace and security«, and under Article 25 of the Charter, »Members of the United Nations agree to accept and carry out the decisions of the Security Council«. The Council is charged with both settling disputes peacefully if possible using the powers granted in Chapter VI of the Charter, and meeting threats to peace by concerted action under Chapter VII. Of particular relevance to the Council's role in international justice is Article 41. Once the Security Council has determined under Chapter VII Article 39 that a threat to peace exists, Article 41 empowers the Council to

»decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of eco-

nomie relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.«

Maintaining peace and security is the Council's primary, but not only, mandate. »[P]romoting and encouraging respect for human rights and for fundamental freedoms for all« is a further purpose of the UN identified in Article 1 section 3 of the Charter, and Article 24 section 2 directs the Council to act in accordance with the purposes of the UN in discharging its primary duty of maintaining international peace and security.

The Council is a decidedly political body, its members chosen not for their wisdom, virtue, or independence, but because they, particularly its five permanent members (the »P-5«), have the political, economic and military strength to keep the peace, especially when they act together in the cooperative manner envisioned by the Charter. Wherever the Council determines aggression or a threat to peace and has the requisite nine votes (without any P-5 member veto), several broad clauses grant it extraordinary powers, with no appeal or recourse to any other authority. Moreover the UN Charter has primacy over the Rome Statute, indeed over all other treaties, under Article 103 of the Charter.

The International Criminal Court was intended to be a credible, independent judicial body, able to adjudicate the most serious of international crimes fairly and impartially, where national judicial systems have failed. It has automatic jurisdiction over genocide, war crimes and crimes against humanity, and an independent Prosecutor empowered, subject to judicial review, to initiate prosecutions either occurring on the territory of a state party or allegedly committed by a national of a state party. The lengthy and elaborate Rome Statute and its Rules of Procedure and Evidence have quite detailed procedural rules governing investigation, prosecution and trial of criminal charges, and appeal of the Court's judgments. One can disagree with the decisions made on particular provisions, but cannot reasonably challenge the manifold intent to create a court that would meet very high standards of due process and impartiality in adjudicating allegations of such serious crimes.

Article 2(1) of the Relationship Agreement between the UN and the ICC, which entered into force in October 2004, »recognized the Court as an independent perma-

nent judicial institution which (...) has international legal personality«. Article 2(2) declares the principle that »The United Nations and the Court respect each other's status and mandate«.

The Rome Statute's preamble recognizes a relationship between the aims of justice and maintaining peace and security. It affirms that grave crimes must not go unpunished not only because they »shock the conscience«, but because they »threaten the peace, security and well-being of the world«. It expresses a determination »to put an end to impunity for the perpetrators of these crime and thus to contribute to the prevention of these crimes«.

There would be impunity for many perpetrators of grave crimes the Court is meant to punish and prevent if the Court's jurisdiction were entirely limited to the nationals of a state party, or where the alleged crime was committed on the territory of a state party (or where the person's state – or the state on whose territory the crime was committed – has accepted the jurisdiction of the Court). The power of referral granted to the Security Council allows for jurisdiction over major atrocities where it would otherwise be unavailable. Further, the stated concern for the »peace, security and well-being of the world« must allow for the possibility that an entirely independent Court might in some instances be counterproductive to those aims. These real concerns open the door to involvement by the very political Security Council in the otherwise very independent Court, although the Council should act with respect for the independent judicial nature and mandate of the Court.

2. Security Council Powers under the Rome Statute

By creating the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and the International Criminal Tribunal for Rwanda (ICTR) in 1994, the Security Council established its power to direct international criminal prosecutions as a tool for promoting international peace and security under Chapter VII, Article 41 of the UN Charter, a power confirmed by decision of the Appeals Chamber of the ICTY. The decisions of the ICTY and ICTR have played a large part in developing the jurisprudence of international criminal justice, while

the establishment and successful functioning of the tribunals gave tremendous impetus to the effort to create a permanent international criminal tribunal after it had languished for many years in the International Law Commission.

The Security Council itself played no role in the creation of the ICC, although its members were active participants in the negotiations at the final Diplomatic Conference in Rome in 1998. The great majority of states favored giving the Security Council power to refer situations to the ICC, although a significant minority did warn of the dangers of politicizing the Court and undermining its independence. More controversial was whether the Council would have power to block investigations or prosecutions. The permanent members of the Security Council (except the United Kingdom) generally sought a role for the Council in filtering cases that could go to the Court, especially by a bar to ICC action regarding any situation that was on the agenda of the Council unless the Council consented to ICC involvement. In the final compromise, the Council was given the power only to defer investigations or prosecutions for renewable one-year periods.

As adopted, Article 13 (b) of the Rome Statute provides that the Court may exercise jurisdiction over statutory crimes if »[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations«.

Article 16 provides that »[n]o 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 Court to that effect; that request may be renewed by the Council under the same conditions«.

Even where a Security Council referral has been made, there is still a role for the ICC Prosecutor in determining whether an investigation should actually proceed. Under Article 53 of the Rome Statute, the Prosecutor should not initiate an investigation if s/he determines there is »no reasonable basis to proceed« or »an investigation would not serve the interest of justice«.

3. Inherent Concerns for the Security Council's Role in the Statutory Scheme

The powers of referral and deferral of ICC prosecutions granted to the Security Council by the Rome Statute can significantly affect the credibility and legitimacy of the Court. A first concern is whether the Council will be perceived as acting fairly and impartially in choosing which situations it should refer to the Court. Will it have credible criteria and processes to choose which situations to refer? Will it refer some situations based on political interests, or refrain from referring some situations based on political ties, even ties of a single veto-wielding permanent member of the Council?

Having referred a situation to the Court, will the Council be a steady and reliable partner in backing the Court and enforcing its decisions? What effect will the referral have in deterring the commission of further crimes in the situation referred, or will the referral be counterproductive to restoring peace and security? Recognizing that the Court's independent course may complicate the settlement of disputes, will the Council be able to effectively use its power of deferral to halt investigations and prosecutions where truly necessary, without acting based on political bias or interest?

Magnifying those concerns, of the five permanent members of the Security Council, only France and the United Kingdom became Parties to the Rome Statute. Russia and the United States signed the treaty without ratifying it, and China has never signed the treaty. The fact that three of the five P-5 members are not themselves parties to the Court, yet exercise such power to refer other non-parties for possible prosecution, and to defer any investigations or prosecutions, is itself of great consequence to the credibility of the Court. The Council's use of its powers of referral, deferral and enforcement to date provide a basis to address these concerns.¹

4. Initial Abuse of the Power of Deferral

The Council's first use of its powers under the Rome Statute damaged both the credibility of the Council in the use

1. If the required 30 ratification and activation votes are obtained, the Council may refer allegations of a crime of aggression to the ICC beginning in 2017. The referrals of Darfur and Libya provide little basis for considering how the Council might come to use that further power of referral in the future.

of those powers, and the legitimacy of the Court. It was done at the behest of a permanent member of the Council that had no interest at that time in seeing the Court succeed, and hence did not mind the damage it was causing.

While the outgoing Clinton Administration signed the Rome Statute without seeking ratification, the Bush Administration was actively hostile to the Court, announcing that the US intended never to ratify the Rome Statute and was thus free to act inconsistently with its purposes. In July 2002, over the opposition of all other fourteen members of the Security Council, the US threatened to veto a routine extension of the UN peacekeeping mission in Bosnia unless UN peacekeepers were granted permanent blanket immunity from ICC jurisdiction. In the compromise Resolution 1422 that was adopted, purportedly under the Council's power of deferral in Article 16 of the Rome Statute, immunity to all UN peacekeepers from non-state parties was granted for a renewable one-year period. It was then renewed for a second year in Resolution 1487 (2003).

These resolutions were legally dubious, as there was no investigation or prosecution underway to be »deferred« under Article 16. As David Scheffer, the Clinton Administration's lead negotiator in the Rome negotiations has written, Article 16 »was never intended to serve as a generic impunity carve-out for vast categories of participants in unknown future military operations and atrocity situations«. For a Council that would later come to use its powers to refer non-state parties to the ICC, it was unseemly and delegitimizing to the Court that the Council's first use of its powers regarding the Court was to insulate one of its permanent members (as well as other non-state party contributors to peacekeeping missions) from jurisdiction.

5. Lessons from the Darfur Referral

»Let's be clear Mr. Ambassador. The United States may not recognize the ICC as a legitimate court. But we certainly do not condone the methods President Zuwanie uses against his own people (...). The French proposal is a diplomatic headache for both of us.«

In this prescient script for the Hollywood thriller *The Interpreter*, an imperious American ambassador warns the ambassador of a mythical African nation that despite

US opposition to the ICC, the crimes against humanity underway in his country would pose a dilemma for the US of whether or not to permit the Security Council to refer the situation to the ICC. Indeed, the US soon faced exactly such a dilemma regarding the Darfur crisis in Sudan, and abstained on the referral resolution, allowing the first, ground-breaking referral of a case to the ICC by the Security Council to occur.

5.1 Sound Basis for the Referral

There was without a doubt a strong factual basis for the Council's first referral. Fighting began between Darfur rebel groups and the Sudanese government in February 2003, with the government arming and supporting »Janjaweed« militias which committed widespread ethnic cleansing against the tribes from which the rebels were drawn. By November 2004, many tens of thousands of people had been killed, some 1.65 million internally displaced, with another 200,000 driven across the border into Chad. Hundreds of villages in the three states of Darfur were burned and destroyed, with indiscriminate attacks on civilians, rape, looting and torture.²

The Council followed a credible process for making the Darfur referral. It began by issuing a presidential statement expressing deep concern over the humanitarian crisis in April 2004, and condemned the violence by all parties in Resolution 1547 adopted in June 2004. In Resolution 1556, adopted under Chapter VII in July 2004, the Council determined that the situation in Sudan constituted a threat to international peace and security, indicated that there was criminal responsibility for the violence being committed, and urged the Sudanese government to investigate and prosecute those responsible. Finally, in September 2004, the Council adopted Resolution 1564 under Chapter VII, establishing a commission of inquiry »to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties«.

The Secretary-General appointed a distinguished five-member commission in October 2004, which visited the Sudan, meeting with government officials, rebels, and NGOs. The commission released its lengthy report in January 2005, finding that war crimes and crimes against

humanity had occurred in Darfur, and recommending that the Security Council refer the situation to the ICC under Article 13(b) of the Rome Statute.

The commission of inquiry, the Council, and later the ICC Prosecutor all gave due consideration as to whether Sudanese authorities were conducting credible investigations which should take precedence under the Rome Statute's principle of complementarity. The ICC itself should further develop case law over time to establish what domestic processes are sufficient to bar ICC action.

The Council can be faulted for not taking adequate measures to directly address the humanitarian crisis in Darfur, but not for lacking an adequate factual basis and credible process for making the referral to the ICC. The roughly 2,000 African Union (AU) soldiers then on the ground were clearly insufficient to stop the killing and displacements, and the Council imposed no sanctions or punitive measures of any kind against the Sudanese government.

5.2 The Flawed Referral Resolution

Acting under Chapter VII, the Council adopted Resolution 1593 referring the situation in Darfur to the ICC on 31 March 2005, with eleven votes in favor, and four abstentions.³ The resolution was justly heralded as a major advance for the Court, allowing investigation and prosecution of crimes committed in a major humanitarian crisis that would otherwise be outside the court's jurisdiction, as the Sudan was not a state party to the Rome Statute. However, certain provisions of the resolution undermined the credibility of the Council in making the referral.

Going beyond the commission of inquiry report and many NGOs, the United States had labeled the crimes in Darfur a »genocide«, but was adamantly opposed to the ICC, and sought creation of an *ad hoc* international or hybrid criminal tribunal to prosecute the violations. Rather than veto the referral resolution, the US was eventually persuaded by other Council members to abstain and allow it to pass, still noting that the US »fundamentally objects« to ICC jurisdiction over the nationals

2. Report of the International Commission of Inquiry on Darfur to the UN Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2005), paras. 73-488.

3. Voting in favor were Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russia, Tanzania and the United Kingdom; Algeria, Brazil, China and the United States abstained.

of states not party to the Rome Statute and therefore does not agree with the referral. China also abstained, stating its opposition to a referral made over the opposition of the Sudanese government. Four significant concessions were written into the resolution at the behest of the US in particular (leading Brazil to abstain on the resolution):

- The preamble does not even cite Article 13(b) of the Rome Statute, but cites only the power of deferral under Article 16. Presumably under that power, paragraph 6 of the resolution then shields from jurisdiction of the ICC nationals of non-party states (other than the Sudan) participating in UN or AU operations in the Sudan. As a permanent rather than one year »deferral«, and by giving blanket immunity from ICC jurisdiction to a broad category of participants, this went beyond the powers granted to the Council in Article 16. The likelihood of any US peacekeeper in the Sudan committing crimes that would warrant ICC prosecution, and the US failing to itself investigate, is extremely remote. For the theoretical value of establishing immunity from the ICC, the Council exacted a serious toll on its own credibility and the independence and legitimacy of the ICC, violating principles of equality before the law.
- The preamble also notes the bilateral agreements with many states extracted by the US providing that U.S. nationals would not be surrendered to the ICC. By noting these as »agreements referred to in Article 98-2 of the Rome Statute«, the resolution seeks to legitimize them, contrary to the view of many international law experts that these agreements misuse Article 98-2 (intended to cover existing agreements between states) to gain prospective impunity for US nationals for the crimes defined in the statute.⁴
- Paragraph 7 of the resolution purports to bar the UN from paying any of the ICC's costs for investigation and prosecution regarding Darfur, and requires that the parties to the Rome Statute (or voluntary contributions) pay those costs. While there is some precedent for the UN not necessarily paying the costs of work

it outsources to other organizations, this was not the Security Council's decision to make regarding the ICC referral, and it should have remained silent. Article 17 of the UN Charter grants the General Assembly (GA) exclusive authority over budgetary matters. As many GA members already resent the much greater power of the Council, it should not exacerbate this by gratuitously usurping powers which clearly belong to the GA.

- Unlike the resolutions which established the ICTY and ICTR, the resolution does not require all UN member states to cooperate with the investigation and prosecution, but merely urges their cooperation, and pointedly declares that nonparties to the Rome Statute have »no obligation«.

The Council quite properly directed the Sudanese government and all other parties to the Darfur conflict to assist and fully cooperate with the Prosecutor and the Court. When the Council acts under Chapter VII to refer a situation to the ICC, it should back up the Court with its full power to mandate cooperation by all UN members.

5.3 A Deterrent to Further Crimes, or an Obstacle to Restoring Peace?

There is much debate whether the referral of the Darfur situation has had any effect in deterring further violations of human rights and humanitarian law, and whether it has helped to restore any measure of peace or made achieving peace and security more difficult. Those who believe there has been a deterrent effect could claim the referral helped pressure one rebel faction and the Sudanese government into adopting the May 2006 peace agreement. In addition, the referral and the first two arrest warrants issued in 2007 could have helped pressure the Sudanese government's acceptance of the eventual UN-AU peacekeeping force (UNAMID), and the voluntary surrender of two rebel leaders indicated later may have influenced the government to resume peace talks.

Those who are skeptical as to any deterrent effect might observe that the killings in Darfur continued unabated after the referral, and even now ICC indictee Ahmed Haroun serves as governor of the Sudan's Southern

4. By the time Resolution 1593 was adopted, over 80 such bilateral agreements had been signed between the United States and other countries, although many had not been ratified. Some agreements were reciprocal, with both parties promising not to surrender nationals of the other state to the ICC.

Kordofan state, where the government has been bombing the civilian population. They would further observe that the government went from being uncooperative during the initial investigation, to deeply hostile after an arrest warrant was issued for President al-Bashir in 2009, expelling both international relief NGOs and Sudanese human rights groups in retaliation, leaving the 2 million displaced persons in Darfur unaided and unassisted. Many observers, including some UN officials, believe the investigation and arrest warrants have made peace negotiations more difficult, alienating both the Sudanese government and African leaders whose cooperation was essential. Others question whether the government would have been any more willing to rein in its forces and allies if there was no referral, observing that fears voiced by many that prosecution would undermine the January 2005 Comprehensive Peace Agreement proved false, with South Sudan successfully seceding after the referendum proceeded on schedule.

Even in hindsight, there can be no clear conclusion to this debate, and reasonable observers can continue to differ, as there is no way to know what would have been the course of events in Darfur had there been no referral, or no subsequent indictment of President al-Bashir, although clearly the fears that prosecution would be disastrously counterproductive were overstated. The referral and the ICC's work should be judged for their success as processes for promoting justice and accountability, and they have been successful in keeping these issues on the table. The high-level AU panel chaired by former South African President Thabo Mbeki took no position regarding the current ICC cases, while calling for additional prosecutions by a hybrid court as well as a truth and reconciliation commission. Having made the Darfur referral to the independent ICC, the Security Council should allow the judicial process to run its course, and support the Court by ordering the cooperation of *all* UN members.

5.4 A Divided Council Declines to Defer Prosecution

The Prosecutor's request for a warrant of arrest for President al-Bashir in July 2008 caused a serious rift between the UN and the African Union. The AU Peace & Security Council and the Organization of the Islamic Conference (OIC) both requested that the Security Council suspend

prosecution under Article 16 of the Rome Statute, with support from the Arab League. Security Council members South Africa and Libya proposed that the pending resolution to renew the mandate of UNAMID include a deferral of the ICC proceedings, and were supported by Russia, China, Burkina Faso, Indonesia and Vietnam. Three P-5 members (France, the UK and the US) and five nonpermanent members (Belgium, Costa Rica, Croatia, Italy and Panama) were opposed to a deferral.

Compromise resolution 1828 was adopted with 14 votes, with preambular language »emphasizing the need to bring to justice the perpetrators« of ongoing attacks, but noting the AU request for deferral and the concerns of Council members over the Prosecutor's application for an arrest warrant for al-Bashir, and »*taking note* of their intention to consider these matters further«. This was a coded threat to still consider a deferral of a prosecution of al-Bashir, or the entire Darfur prosecution. In a remarkable shift away from its history of hostility to the Court, the US insisted any deferral would damage the integrity of the Court, and helped force the compromise by threatening to veto a deferral. The US then abstained on the vote, taking strong exception to this language taking note of the deferral request.

Fortunately the requirement of nine votes and no P-5 veto constitutes a high bar for any deferral resolution, but the effort should never have gotten this far. Article 16 was a compromise with states that wanted the Security Council to have power to block the initiation of ICC investigations in Chapter VII situations, but was not intended for the Council to use to later defer matters it had itself referred to the Court. Once a referral is made it sets in motion an independent judicial process which the Council should respect.

5.5 Inadequate Support for the Court's Work

Resolution 1593 clearly directs the government of Sudan to cooperate fully with the ICC and its Prosecutor, but Sudan has refused to arrest and surrender government minister Ahmed Haroun and Janjaweed militia leader Ali Kosheib, charged with crimes against humanity and war crimes in the ICC arrest warrants issued in April 2007, nor President al-Bashir since the warrant for his arrest was issued in March 2009. The Prosecutor reported to the Council in December 2007 that the Sudan was

not cooperating, but China blocked efforts to have the Council issue a presidential statement. The Prosecutor again briefed the Council on the Sudan's noncooperation in June 2008. This time Costa Rica threatened to table a resolution that China would have to veto, an embarrassment on the eve of hosting the 2008 Olympics, and China allowed the Council to issue its first and only presidential statement noting the arrest warrants and urging the Sudan to »cooperate fully with the Court«. The Council has failed to take any further action to demand the Sudan's cooperation, even after the Court delivered to the Council a judicial decision finding that the Sudan had failed to execute the arrest warrants for Haroun and Kosheib.

The failure to cooperate with the Court now extends to some parties to the Rome Statute who are obligated to cooperate under Part 9 of the treaty, as well as non-parties. The Council has taken no action since receiving further decisions of ICC judges in December 2011 that the ICC parties Malawi and Chad had hosted visits by al-Bashir but failed to execute the warrants.⁵ Other African state parties, including Botswana, South Africa and Uganda, have said they would arrest al-Bashir if he attempted to visit them. ICC party Kenya hosted a visit by al-Bashir, but the Kenyan High Court later issued an arrest warrant for the Sudanese President. The Council should explicitly reaffirm the obligation of Chad and Malawi to cooperate with the ICC following the decision of the pre-trial chamber.

Most inappropriately for a permanent member of the Council, China hosted a visit by al-Bashir in June 2011, sending a strong signal that Sudan need not fear an enforcement resolution by the Council. Even the transitional government in Libya, which came to power aided by Chapter VII measures taken by the Council to protect civilians endangered by the former Gadhafi regime (whose leadership is itself under ICC indictment), has welcomed an official visit by al-Bashir. Libya – and China – as non-ICC state parties, are under »no obli-

5. The African Union criticized the decision of the pre-trial panel, claiming the ICC should have deemed al-Bashir to be protected by head-of-state immunity, and that Chad and Malawi were right to follow their obligations as AU members to comply with the AU decision directing its member states not to cooperate in the arrest and surrender of al-Bashir. <http://www.sudaneseonline.com/epressrelease2005/mar17-05640.html>. The better view is that Paragraph 2 of SC Res 1593 relieves non-state parties of an obligation to cooperate with the ICC, but implicitly reaffirms the obligation of state parties to do so, and thus the Security Council's referral of Darfur to the ICC trumps any obligations under the African Union's Constitutive Act.

gation« to cooperate with the Court's Darfur investigation under the pointed terms of paragraph 2 of Resolution 1593. This again illustrates that the Council should have used its Chapter VII powers to require the cooperation of all UN members.

Fortunately the Council has not deferred any part of the Darfur prosecution under Article 16. However, the failure to mandate cooperation by Sudan, by ICC parties, and also by other UN members, can be considered something of a *de facto* deferral of the prosecution. Again, when the Council makes a referral to the ICC, it sets in motion an independent judicial process which should be fully supported by the Council.

6. Lessons from the Libya Referral

The harsh crackdown on largely peaceful protestors in Libya by the Gadhafi regime, the inflammatory threats by Colonel Gadhafi himself, and longstanding resentment of the eccentric Libyan leader by many states triggered an extraordinary series of UN actions, including a unanimous decision by the Council to refer the situation in Libya to the ICC.

6.1 Credible Evidence but a Truncated Process for Referral

Certainly there was evidence of crimes against humanity and war crimes at the time the Council acted. Libyan security forces opened fire on peaceful protestors in Tripoli and in the eastern city of Benghazi, killing at least 300 people. Gadhafi himself manifested criminal intent in suppressing the protestors, calling on his supporters to »attack them in their lairs«, and promising to fight »to my last drop of blood«. Libya's Justice Minister resigned, and Libyan ambassadors and diplomats in China, India, France, Morocco, Tunisia, Malaysia, the US and at the UN defected in protest of their government's crackdown.

First to act was the UN Human Rights Council (HRC) in Geneva, in a resolution adopted 25 February 2011 that »strongly condemn[ed] the recent gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful protestors, some of which may also amount to crimes

against humanity». After recalling »the importance of accountability and the need to fight against impunity«, the HRC resolution created an international commission of inquiry to investigate the alleged crimes, identify the perpetrators, and recommend accountability measures.⁶

On 26 February – the next day – the Security Council adopted Resolution 1970 by unanimous vote of all 15 members, referring the situation in Libya since 15 February to the ICC. With little time for forethought, the principal proponents on the Council – France, Germany and the UK – decided to seize the moment and ask for immediate referral. With Libya's deputy UN ambassador as well as other Arab states supporting the referral, states that were usually hostile to the ICC, or at least to referrals made over the opposition of the government affected – China, India and Russia – all joined in supporting the referral resolution. Some Council members – including Brazil, Gabon and Portugal as well as India – were concerned that the referral might injure prospects for peace, and believed justice should be sequenced after peace, but nonetheless joined the unanimous decision.

To the extent the Council believed referral might help protect civilians and restore peace and security, required for a measure taken under Chapter VII, rapid referral was justifiable. It did not follow an ideal process for acting after consideration of objective criteria, and notably did not wait for the report of the commission of inquiry announced by the HRC only the day before. Well-meaning states, supportive of the ICC, may have hoped referral would strengthen the Court by establishing a second precedent of Security Council referrals.

Unlike the Darfur referral, it cannot be said that the Council was relying on referral to the ICC alone to restore peace and security. Resolution 1970 also imposed an arms embargo, a travel ban on designated Libyan officials, and an asset freeze on designated officials and entities. With Gadhafi forces menacing the population of rebel-held Benghazi, only three weeks after Resolution 1970 the Council adopted Resolution 1973 authorizing UN member states to »take all necessary means« (i. e. military force), with the exception of an occupation force, to protect civilians.

6. The HRC resolution also recommended that the General Assembly suspend Libya's membership on the HRC. The GA did so on 1 March 2011, an action that had never before been taken against any HRC member.

Resolution 1970 was an historic high-water mark for the Council's embrace of the ICC. In Libya as in Darfur, it was only the use of the Council's power of referral that made justice and accountability possible, extending the reach of the Court to states that had chosen not to become parties to the Rome Statute. The fact that this was done so rapidly, by unanimous vote, and at the urging of a defecting Libyan diplomat at the UN, made it all the more remarkable. In hindsight, it might have been better to allow a full process of inquiry to establish the facts justifying referral, and also to call upon Libya to first exercise its national responsibilities to investigate crimes under the Rome Statute's principle of »complementarity«, however unlikely.

6.2 Again, a Flawed Resolution

Due to the extraordinary speed with which Resolution 1970 was adopted, the language of the Darfur referral in Resolution 1593 was largely used again unchanged. To act swiftly, there was no time for intra-governmental processes, those of the US in particular, to reconsider the limitations that had been written into Resolution 1593. Reference to the US bilateral agreements with other states under Article 98-2 was dropped, but the resolution retained (a) reference only to the Council's power of deferral under Article 16, and not to the power of referral under Article 13(b), (b) exclusion of nationals of non-party states from jurisdiction,⁷ (c) purported recognition that the ICC state parties and not the UN will pay the costs of investigation, and (d) language that merely urges UN members not party to the Rome Statute to cooperate with the ICC while stating they have »no obligation« to do so.

With this language now enshrined in both referral resolutions, there is a danger that the precedent will be repeated again in future referrals. With the Court already suffering a very substantial backlash from African states, which are dismayed that all ICC prosecutions to date have been of African nationals (even if apart from Darfur and Kenya, as a result of referrals by African states themselves), it is very unhelpful for non-state parties on the Security Council to exclude themselves from ICC jurisdiction while referring another non-state party to the Court, and to usurp the GA's power to make the decision whether to fund the costs of the referral.

7. Brazil, which had abstained on Resolution 1593 because of the inclusion of this language, supported Resolution 1970, still noting its objection.

6.3 A Court Abandoned?

The Prosecutor acted quickly on the referral, finding on 3 May 2011 that there was a reasonable basis to open an investigation, and on 16 May requested arrest warrants for Muammar and Saif al-Islam Gadhafi and for Libyan intelligence chief Abdullah al-Sanusi. The UK and France, originally strong proponents of the referral, and the US, were by late March involved in military action in support of the no-fly zone and civilian protection authorized by resolution 1973, adopted by the Security Council on 17 March. They became increasingly interested in finding a peaceful end to the hostilities, and willing to push the judicial process aside. In July, both British and French officials made statements entertaining a political settlement in which Gadhafi would relinquish power but remain in Libya. It was left to the Prosecutor's office to issue a reminder that any peace settlement should respect the decision by the ICC to authorize prosecution of Gadhafi based on the Security Council referral.

After the fall of the Gadhafi regime in August and the emergence of a transitional government, the priority for the US, UK and France appeared to be their relationship with the new authorities, and not support for the prosecution referred to the ICC. Resolution 1970 requires Libyan authorities to »cooperate fully« with the ICC, but the government has said repeatedly that it prefers to try Saif al-Islam Gadhafi in Libyan domestic proceedings rather than surrender him to the Court. Except perhaps for Germany, Security Council members have not voiced support for the continuing ICC proceeding. Speaking in Tripoli in November, the permanent US representative said the US would not press for Saif Gadhafi's surrender to the ICC. UK officials have said they want to see a process that respects international standards, without demanding Saif al-Islam's transfer to The Hague.

The decision on whether Libyan courts are entitled to try Saif al-Islam Gadhafi under principles of complementarity rather than the ICC lies with the Court under Articles 17-19 of the Rome Statute. Having set in motion this independent judicial process, it is vital that the members of the Security Council respect and support it.

This is especially true of the principal proponents of the referral - if they are not to be left open to attack for having supposedly sought the referral for political purposes as a precursor to »regime change«. The referral

should stand on its own as a principled invocation of the ICC to achieve justice, and not get tied to the controversy within the UN over whether NATO powers used force beyond the authority granted in Resolution 1973. Council members can best affirm the credibility of the referral by supporting the continuing independence of the judicial process it authorized.

6.4 A Deterrent to Further Crimes, or an Obstacle to Restoring Peace?

There is again room for debate as to whether the referral of Libya had any deterrent effect, if not on Gadhafi then on others associated with his regime who might not otherwise have defected. There were defections from Gadhafi's inner circle, and some of them may have been motivated by fear of prosecution. Some rebel leaders may also have been constrained by the possibility of prosecution, as all parties to the conflict in Libya were subject to ICC jurisdiction under the referral.

It is also impossible to know if the referral might have cut off a real possibility that Gadhafi would have negotiated his departure. It does not seem likely from his »fight to my last drop of blood« rhetoric, but this might have been bluster, and facing inevitable defeat, Gadhafi might have accepted exile, preventing the bloody conflict that went on until his capture and death on October 20. Some might argue that the Council should not have made the referral so quickly, in order to allow more possibility for a negotiated solution.

With the actual effects on the situation in Libya unknowable, the most important consequence of the unanimous Security Council referral was to send out a strong signal that war crimes and crimes against humanity in states not party to the Rome Statute will not go unpunished, and that the Council is prepared to act with clear resolve to refer such situations to the ICC. A high likelihood of punishment for serious crimes, wherever committed, would greatly enhance the value of the ICC for general deterrence.

7. The Security Council Declines to Defer Kenyan Investigation

Kenya accepted the ICC's jurisdiction by signing and ratifying the Rome Statute. An international commission of inquiry established by the government of Kenya to

investigate violence in the wake of the December 2007 presidential election recommended establishment of a special tribunal to prosecute alleged violations. When the deadline agreed by the government and the ICC Prosecutor for Kenya to initiate prosecutions passed in September 2009 with the Parliament unable to establish a tribunal, the Prosecutor initiated an ICC investigation based on the information he had received, the first time an investigation was commenced without a referral from a government or from the Security Council.

Beginning in late 2010, the government of Kenya sought a deferral of the investigation by the Security Council under Article 16 of the Rome Statute, claiming the potential ICC cases could be handled by a credible local mechanism. This request was endorsed by the African Union in January 2011, with the Council carrying on an interactive dialogue with Kenya on 18 March, 2011, and further discussing the situation informally on 8 April, but in the end taking no action. The Council was entirely correct, as deferral must be made under Chapter VII of the UN Charter and therefore requires a finding that ICC investigation would pose a threat to international peace and security. Kenya also followed the proper procedure of challenging the admissibility of ICC investigation under Article 19 of the Rome Statute based on potential domestic prosecution, but this was rejected by an ICC Pre-Trial Chamber in May 2011. The Pre-Trial Chamber has now authorized ICC trials to proceed against four indicted Kenyan political leaders.

The Council is to be commended for properly applying the standards of the Rome Statute and Chapter VII of the Charter in declining to defer the Kenyan prosecution, despite substantial political pressure.

8. Failure to Refer Other Grave Situations

A number of situations that might have been referred by the Council to the ICC have not been, often because the state concerned has veto-wielding allies amongst the P-5 Council members. Situations involving Chechnya, Gaza or Burma, for example, would never be referred to the ICC as a result of strong allegiances held P-5 members. A UN panel of experts concluded that up to 40,000 civilians were killed at the conclusion of the conflict between the government of Sri Lanka and Tamil rebels in 2008-2009, with war crimes probably having been

committed by both sides to the conflict.⁸ The panel's recommendation for the appointment of a commission of inquiry has not been implemented, and there has been no effort at the Council to make an ICC referral, despite the continuing failure of the government to launch an adequate domestic investigation.

A particularly clear example is the Council's failure to even consider a referral of the current situation in Syria to the ICC, despite factual and procedural preconditions at least as pronounced as those that existed in Darfur and Libya. Since March 2011, thousands of largely peaceful protestors have been killed by Syrian security forces, with many more being detained and tortured. A special session of the UN Human Rights Council (HRC) in April 2011 condemned »the use of lethal violence against peaceful protesters by the Syrian authorities« and asked the Office of the High Commissioner for Human Rights (OHCHR) to send an investigatory mission. A presidential statement by the Security Council on 3 August condemned »the widespread violations of human rights and the use of force against civilians by the Syrian authorities« and said »[t]hose responsible for the violence should be held accountable«.

Based on the report of the OHCHR mission, the High Commissioner in her briefing to the Security Council in August encouraged the Council to refer the situation in Syria to the ICC. States drafting a Security Council resolution on Syria in August originally proposed a reference »noting« the recommendation of an ICC referral, but even this was removed from the resolution tabled at the Security Council – and vetoed by Russia and China – in October. Another special session of the HRC in August 2011 had established an international commission of inquiry, and the report of that commission in November found that there was both individual and state responsibility for crimes against humanity likely committed by Syrian authorities. Briefing the Security Council again in December, the High Commissioner declared that »the need for international criminal accountability has acquired even greater urgency«. Yet another special session of the HRC in December recommended »that the main bodies of the United Nations urgently consider the report of the commission of inquiry and take appropriate action«.

8. Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (31 March 2011).

Despite this overwhelming factual and procedural pre-conditions for referral, this remains politically impossible at the Security Council as a result of veto powers. A second draft Security Council resolution condemning gross violations in Syria – also vetoed by Russia and China on 4 February 2012 – omitted any reference to a possible ICC referral as well, merely including a general statement calling for »all those responsible for human rights violations, including acts of violence, [to be] held accountable«.

9. Relationship at a Crossroads

As inaction on Syria in particular demonstrates, the unanimous referral of Libya to the ICC has not set the Council on a path of referring even the most clearly documented violations to the ICC. Indeed, given the backlash within the UN over the NATO operation under Resolution 1973, conflated with the referral under Resolution 1970, it may be some time before we see any further referrals.

Unfortunately, the likeliest course is that the Security Council will only make future referrals in extraordinary circumstances. In the case of Darfur, there was a global outcry over crimes which had created a truly massive humanitarian crisis, and the Council, facing pressure to »do something«, and unable and unwilling to intervene more actively, referred the situation to the ICC. In Libya, there was an unusual alignment of circumstances, including states long hostile to the eccentric leadership of Libya, regional powers responding to the pressure of the »Arab Spring« rebellions, and defecting diplomats from Libya itself, which produced a sudden referral.

Both of these referrals had factual and legal merit, and the problem of Security Council referrals continues to be under-inclusiveness rather than over-inclusiveness. The Council can use its power of referral in Chapter VII situations to bring the world closer to universal ICC jurisdiction for mass atrocities. In any event the Council's referral is not the last word; the Prosecutor still decides whether to proceed with an investigation. The challenge for the Council is to develop objective criteria and credible processes for considering referrals to the ICC, and to attempt to behave as juridically as possible in determining whether particular situations warrant referral. There has been some discussion, but no concrete pro-

posals on the table, for what such criteria might be. The UN High Commissioner for Human Rights has suggested possible triggers for a referral might include a resolution of the Human Rights Council or advice from the ICC Prosecutor, in addition to an international commission of inquiry report, and possibly a role for OHCHR.⁹ A recent UN workshop discussed suggestions that the Council develop an »indicative checklist« to consider referrals and promote consistency in Council practice.¹⁰ The Council might also consider forming a body of international criminal law experts to advise it on possible referrals.

While due consideration should be given to genuine concerns that a referral will seriously impair peace prospects, Council members should not allow political motivations or allegiances to obstruct the need for justice and accountability. Ideally, the P-5 members would refrain from use of their vetoes, and would all become parties to the Rome Statute, enhancing their credibility in referring situations arising in other states. Absent real reason to believe a referral is likely to be effective in preventing the commission of further crimes, there is no need for haste in making referrals. It might often be best for the Security Council to condemn atrocities, and explicitly call on national authorities to investigate and prosecute, using the threat of a referral to encourage national prosecutions under the Rome Statute's complementarity principles. If national authorities fail to mount an adequate investigation, it is important to the credibility of the Council that it in fact then proceed to make a referral of the situation to the ICC.

A real concern as to the Council making more use of its referral power is that the ICC is already overburdened, and will require more resources. In December 2011, the ICC state parties reduced the Court's budget by €9 million below the Court's request. The Office of the Prosecutor's approved budget for the Darfur investigation alone was €4.6 million in 2009, €4.1 million in 2010, and €2.3 million in 2011,¹¹ not including the Darfur investigation's proportionate share of the overhead for the ICC's judges, Registrar, support staff and facili-

9. Remarks by Navi Pillay at the Retreat on the Future of the International Criminal Court, Liechtenstein, 16-18 October 2011.

10. Highlights from the Workshop on Accountability and Fact-finding Mechanisms for Violations of International Humanitarian Law: The Role of the Security Council – Past and Future (1 November 2011), <http://www.missionofportugal.org/mop/images/documentos/nov0111.pdf>.

11. Proposed Programme Budget for 2012 of the International Criminal Court, ICC-ASP/10/10 (December 2011), para. 88 Table 12.

ties, all borne by states parties, not by the UN. Funding referred investigations is not the responsibility of the Security Council, but neither should it seek to bar the General Assembly from doing so. The financing decision is the GA's responsibility under both Article 17 of the UN Charter and Article 115 of the Rome Statute.

As to the Council's power of deferral in Article 16, while technically it can be read to allow deferral of investigations and prosecutions initiated by the Council as well as those initiated by states or the Prosecutor, this was not the intent in the negotiations creating the Rome Statute. It would seriously damage the independence of the Court for the Council to turn ICC proceedings on and off, initiating proceedings to try to obtain a political result, and then deferring proceedings again to provide an amnesty or different political result. Fortunately, the Council has shown judicious restraint, and has not used its power of deferral to date to defer any investigation or prosecution, whether initiated by a state, the Prosecutor or by the Council itself.

10. Some Specific Suggestions Regarding ICC Referrals by the Security Council

- In determining whether to make a referral to the ICC, the Council should act to promote justice and accountability, as there is a considerable likelihood that consistency in prosecuting perpetrators of serious crimes before the ICC will greatly enhance the deterrent value of the court and serve the Council's long-term goal of maintaining peace and security. Perpetration of atrocities that constitute crimes under the Rome Statute should be presumed to threaten international peace and security.
- The Council should establish a working group to develop objective criteria and credible processes for considering potential referrals to the ICC. Ideally, consideration should be based on an impartial expert assessment as was done in the case of Darfur, and as remains before the Council in the case of Syria.
- The Council should demand investigation and prosecution by national authorities under the Rome Statute's principle of complementarity, but should proceed to then make a referral to the ICC where national authorities fail to launch an adequate investigation and prosecution.
- The Council should refrain from excluding nationals from non-state parties from jurisdiction, and adhere to a principle of equality before the law for all persons within situations referred to the ICC.
- The Council should be silent as to funding the costs of its referrals, and leave the financing decision to the General Assembly.
- The Council should direct that all UN member states fully cooperate with the Court in any investigation referred by the Council, and should support the Court with its enforcement powers under Chapter VII.
- The Council should fully respect and support the independent judicial process set in motion by a referral.



About the author

Lawrence Moss is an international lawyer based in New York City. He has represented Human Rights Watch and the New York City Bar Association at the United Nations, and served as a consultant to the Open Society Institute, a member of the Task Force on Human Rights of the United Nations Association USA, and adjunct professor at New York University's Center for Global Affairs. Moss is a graduate of Brown University and Stanford University Law School, and is a member of the bar of the State of New York and the State of Washington. The views expressed in this article are his own, and do not necessarily represent the position of any organization with which he has been associated.

Imprint

Friedrich-Ebert-Stiftung | Global Policy and Development
Hiroshimastr. 28 | 10785 Berlin | Germany

Responsible:
Britta Utz | Human Rights
Marius Müller-Hennig | Global Peace and Security Policy

Phone: ++49-30-269-25-7476 | Fax: ++49-30-269-35-9246
<http://www.fes.de/GPol/en>

To order publications:
Sandra.Richter@fes.de

Global Policy and Development

The department Global Policy and Development of the Friedrich-Ebert-Stiftung fosters dialogue between North and South and promotes public and political debate on international issues in Germany and Europe. In providing a platform for discussions and consultation we aim at raising awareness of global interdependencies, developing scenarios for future trends and formulating policy recommendations. This publication is part of the working line »Global Peace and Security Policy«, in charge: Marius Müller-Hennig, Marius.Mueller-Hennig@fes.de.

UN Security Council in Focus

This publication is part of the series »UN Security Council in Focus«, which analyses issues on the agenda of the Security Council as well as its reform and position in the system of the United Nations.



The views expressed in this publication are not necessarily those of the Friedrich Ebert Stiftung.

This publication is printed on paper from sustainable forestry.



ISBN 978-3-86498-078-7