CHAPTER – 4

RELATIONSHIP BETWEEN THE UNITED NATIONS AND THE INTERNATIONAL CRIMINAL COURT

“For nearly half a century -- almost as long as the United Nations has been in existence -- the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought... that the horrors of the Second World War -- the camps, the cruelty, the exterminations, the Holocaust -- could never happen again. And yet they have -- in Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time -- this decade even -- has shown us that man’s capacity for evil knows no limits”.
- Kofi Annan United Nations Secretary General

4.1. Introduction

The United Nations Charter of June 1945 expressed the determination "to save succeeding generations from the scourge of war". The Preamble of the UN charter spoke of the equality of nations, large and small, and called for enhanced social justice, tolerance and respect for international law. In August 1945, London Charter was signed for creating the International Military Tribunal (IMT), to bring to justice some of the German leaders responsible for aggression, crimes against humanity and related atrocities. Similar tribunal (IMT) was also set up at Tokyo to try those who were responsible for war crimes. The United Nations in 1946 had called for drafting a code of international crimes and an international criminal court to be built on the Nuremberg precedents. But since the definition of the crime of aggression could not be agreed upon by the delegates, the criminal code could not be drafted, and without a code there could be no court. In fact the powerful nations were not ready to give up their sovereignty to any international criminal tribunal. But after a definition of aggression was finally reached by consensus and a resolution by General Assembly was adopted in 1974 on

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1 The Holocaust and the Nuremberg Trials, From UN Chronicle, December 2005, in http://www.benferencz.org/
2 ibid
Definition of Aggression, the stage was set for the work on the criminal code and the court.

But even then no further steps were taken by the United Nations thereafter for the establishment of a permanent international criminal court. It took mass rapes in the former Yugoslavia in 1991 to shake the world out of its lethargy. In 1993, the UN Security Council acting under chapter VII created the International Criminal Tribunal for the Former Yugoslavia (ICTY) to hold those responsible for war crimes, crimes against humanity and the genocide cloaked as “ethnic cleansing”. When over 800,000 people were slaughtered in Rwanda in fratricidal tribal rivalries between the Hutus and the Tutsis, the Security Council set up another ad-hoc tribunal — the International Criminal Tribunal for Rwanda (ICTR) — to bring the instigators and individual perpetrators to justice. Now such international tribunals having limited jurisdictions are beginning to function for crimes against humanity committed in Cambodia, Sierra Leone, Timor Leste, etc. It is most important to note that temporary courts created for a limited time in a limited area after crimes have been committed is hardly the most efficient way to ensure international justice. The Security Council also had to pay heavy costs for the establishment and working of the criminal tribunals for former Yugoslavia and Rwanda. The missing link in the world’s legal order was a permanent court with universally binding laws that might help deter such crimes before they occurred. After many years of difficult negotiations and compromises, the Statute for the International Criminal Court (ICC) was adopted under a treaty signed in Rome on 17 July 1998, with 120 delegations voting in favour and 7 against. UN Secretary-General Kofi Annan called it “a gift of hope to future generations”.

4.2. Relationship between the International Criminal Court and the United Nations

In July 1998 in Rome, 120 Member States of the United Nations adopted a treaty to establish – for the first time in the history of the world – a permanent
international criminal court. The Rome Statute has created an independent international structure complementary to the United Nations system of regulating relations between states. It is being hoped that this structure will ideally provide the judicial arm of the United Nations system – in the field of criminal law. The Rome Statute in its Preamble mentions that the State Parties to the Statute are determined to put an end to the impunity for the perpetrators of the most serious crimes of concern to the international community and for the sake of present and future generations, establish an independent permanent international criminal court in relationship with the United Nations systems, with jurisdiction over the most serious crimes of concern to the international community as a whole. The Preamble thus provides for the establishment of a permanent international criminal court, which will be in relationship with the United Nations system. The relationship between the ICC and the UN was to be brought through an Agreement to be approved by the Assembly of State Parties to this statute and thereafter concluded by the President of the court on its behalf.

Apart from the relationship Agreement that has already come into force between the UN and the ICC, we may conclude from the Rome Statute that the UN and the ICC have a close relation, as UN is also the funding body of the ICC. Article 115 of the Statute provides that ‘the expenses of the Court and the Assembly of the States Parties ...shall be provided by- assessed contributions made by the States Parties and Funds provided by the United Nations, subject to the approval by the General Assembly’.

**Agreement between the International Criminal Court and the United Nations** - An Agreement, that provides framework for the relationship between the UN and the ICC, was entered into force directly upon signature,

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8 It must be noted that the mandate of the International Court of Justice is not related to the exercise of universal jurisdiction but is mainly to litigate between the sovereign states in Hans Kochler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads*, Manak Publications Pvt Ltd (Indian Reprint, 2005).
9 See Rome Statute, Article 2
on Oct. 4, 2004. It was signed in New York by Judge Philippe Kirsch, President of the ICC, and Kofi Annan, Secretary General of the UN. The agreement recognizes the role and mandates of both the institutions. It further strengthens the cooperation of the two organizations on matters of mutual interest relating to the exchange of information, judicial assistance, cooperation on infrastructure, and technical matters. The UN also undertakes to cooperate on judicial issues, if the court requests the testimony of an official of the United Nations or one of its programmes, funds or offices.

In effect, the Agreement reinforces and institutionalizes the relationship between the ICC and the UN, ensuring that on both philosophical and practical level these two important elements of international law and justice can work together.

The mandate of the ICC is based on the principles and purposes of the UN charter, but is not dependent on the UN; neither is the ICC a specialized agency of the UN. The Agreement between the Court and the UN does not make the ICC into a specialized agency within the UN system. For making organization a specialized agency of the UN, there must be a considerable consensus within the United Nations as a whole; but it was most unlikely that the ICC could become a specialized agency so long as three of the five permanent members of the Security Council - the United States, China and Russia - as well as a number of other populous and powerful states such as Egypt, India, Indonesia, Iran, Israel and Pakistan are not parties to the ICC statute and few of them in fact actively oppose the court. The controversy whether ICC will be made a specialized agency came to rest after the agreement was signed between the ICC and the UN in October 2004, wherein the UN recognizes the Court as an independent permanent judicial institution which has international legal personality and such legal capacity as may be

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10 ICC Newsletter # 2, October 2004 at http://www.icc-cpi.int/
11 http://www.icc-cpi.int/newspoint/pressreleases/47.html
12 Kenneth S. Gallant, The International Criminal Court in the system of States and International Organizations, Leiden Journal of International Law, 16(2003), p 570
necessary for the exercise of its functions and fulfillment of its purposes. Therefore, it cannot be treated as a specialized agency of the UN. In the absence of such a status of ICC not being a specialized agency of the UN, the ICC cannot be authorized by the General Assembly to make direct requests for advisory opinions to the International Court of Justice.

The role of the International Criminal Court is more or less the same as that of the Security Council (SC) of the United Nations, i.e. a watchdog to end impunity and thereby maintaining international peace and security. The ICC, though is distinct from the United Nations, yet it is exercising authority in a field that had previously been occupied, albeit on a piecemeal basis, by the Security Council.

The Security Council of the UN has a very crucial role under the UN charter to maintain international peace and security, and to that end it can also take enforcement action under Chapter VII. To bring about international justice and to punish the perpetrators of the most serious crimes committed in former Yugoslavia and Rwanda, the Security Council had set up the international criminal tribunals for former Yugoslavia and Rwanda through resolutions under Chapter VII.

The UN charter has given wide powers to the Security Council under Chapter VII as discussed above where it can take enforcement action against the states that are threatening international peace and security. Not only the UN

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13 See Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Article 2
14 See UN charter, Article 96(1). The General Assembly itself could ask for advisory opinions from the International Court of Justice (ICJ). Former ICJ President Stephen M. Schwebel had suggested that the General Assembly might establish a committee to screen requests from international tribunals for such references to the ICJ. UN Press Release GA 9642 (26 Oct. 1999) in Kenneth S. Gallant, The International Criminal Court in the system of States and International Organizations, Leiden Journal of International Law, 16(2003), page 570
16 The International Tribunal for the Prosecution of Persons Responsible for serious violations of International Humanitarian Law committed in the territory of the former Yugoslavia since 1991 was established by SC resolution 827 on 25 May 1993
17 The International Criminal Tribunal for Rwanda was set up by SC resolution 955 (1994) on 8 Nov. 1994
The Rome Statute has given wide powers to the Security Council. The Rome Statute empowers the Security Council to order both referrals of situations to the Court and deferrals of investigations and prosecutions undertaken by the court\(^\text{18}\). In cases referred to the court by the SC, the Court may also refer failures of State Parties to cooperate with the court to the SC, and may inform the Council of failures of other states to comply with ad-hoc arrangements with the court\(^\text{19}\).

These are the fundamental aspects of the functional relationship between the United Nations and the ICC. The practical aspect of the power given to the SC under the Rome Statute needs an elaborate study, and the same is being done in the following paragraphs.

### 4.3. Powers of Security Council under the Rome Statute of the International Criminal Court

The International Criminal Court (ICC) is an independent entity and it does not need a special mandate either from the United Nations or the Security Council in particular to work independently, although under the Rome Statute, Security Council (SC) has been given power to initiate the proceedings in the Court\(^\text{20}\). The Rome Statute empowers the Security Council to refer a particular situation to the Prosecutor, acting under Chapter VII of the UN Charter, where it appears that one or more of the crimes covered within the jurisdiction of the court has been committed.

The Security Council has on many occasions taken action under Chapter VII, for maintenance and restoration of international peace and security. Before the Security Council can adopt measures relating to the enforcement of world peace, it must first "\textbf{determine the existence of any threat to the peace,}\)

\(^{18}\) See Rome Statute, Article 13 & Article 16

\(^{19}\) Supra note 12 at 571

\(^{20}\) Rome Statute Article 13 (b) provides, "The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this statute 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".
breach of the peace or act of aggression"\textsuperscript{21}. Once determination of such a situation is made, then the Security Council can take necessary enforcement action under Chapter VII of the charter. The criteria for determination of such a situation vary from case to case.

The first time, a "threat to the peace" was determined by the Security Council under the UN charter, was in 1948 (in Middle East war), when the Security Council found the situation in former mandated territory of Palestine, a threat to the peace within the meaning of Article 39, because the neighboring Arab countries had entered the territory in order to conduct hostilities against the state of Israel. The Security Council in its resolution demanded a ceasefire. In 1966, Security Council determined the situation of minority white regime in Rhodesia constituted a threat to the peace, under Resolution 221 (1966)\textsuperscript{22}.

After the cessation of the cold war, the Security Council in many situations had taken action under Chapter VII, i.e. in former Yugoslavia\textsuperscript{23}, Somalia\textsuperscript{24}, Liberia\textsuperscript{25}, in Rwanda\textsuperscript{26}, Libya\textsuperscript{27} and so on. Later in 1996 again, Security Council determined a situation in Sudan threat to international peace, for its failure to comply with earlier resolutions demanding that it extradite to Ethiopia suspects on its territory in connection with an assassination attempt against the President of Egypt, for prosecution.

For "breach of the peace", the Security Council passed resolutions in only four situations. The first time it was in 1950 when South Korea invaded North Korea, Security Council determined the situation as breach of peace by its resolution S/ 1501. Then in Falkland Islands, the invasion by Argentina was considered breach of peace by the Security Council resolution 502 (1982). The third situation was Iran-Iraq war, when the Security Council determined

\textsuperscript{21} Malcolm N. Shaw, \textit{International Law} (Fifth Edition), Cambridge University Press (2005) at p 1120
\textsuperscript{22} \textit{ibid} at p 1121
\textsuperscript{23} See Security Council Resolution 713 (1991)
\textsuperscript{24} Security Council Resolution 733 (1992)
\textsuperscript{25} Security Council Resolution 788 (1992). The SC resolution determined, deteriorating civil war as threat to international peace by the Security Council
\textsuperscript{26} Security Council Resolution 955 (1994), Security Council determined genocide in Rwanda as threat to international peace and security
\textsuperscript{27} See Security Council Resolution 748 (1992)
breach of peace by its resolution 598 (1987). The fourth situation is still fresh in our minds, which was during Saddam Hussein’s regime, i.e. invasion of Kuwait in 1990. Resolution 660 (1990) declared the situation breach of international peace and security by the Security Council.

The Security Council has power to take action under Chapter VII also in case of “act of aggression”. Though the international community could not agree on the definition of aggression, the General Assembly in 1974 adopted resolution on Definition of Aggression. Article 1 of the resolution defines aggression as, “use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the United Nations charter.”

Under Chapter VII, Article 39 gives power to the Security Council to take measures in case of threat to the peace, breach of the peace or act of aggression, and maintain international peace and security.

Referral of situation by Security Council under the Rome Statute and the First Referral in the case of Darfur by the Security Council – As already been briefly discussed, the Security Council (SC) has been given wide powers under the Rome Statute of the International Criminal Court. The Security Council has the power to refer the situation to the Prosecutor under Article 13 (b), in case of threat to the peace, breach of the peace or act of aggression. Thereafter, the Prosecutor may take further necessary action after analyzing the situation. The power of the SC to make referral of a situation to the Prosecutor of the Court is an important power, as the use of this provision can enhance considerably the jurisdictional reach of the ICC by using its power of referral in relation to situations involving non-party states. It is important to

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28 General Assembly Resolution 3314 (XXIX)
29 UN Charter, Article 39 provides, “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 Article 41 and 42, to maintain or restore international peace and security.
clarify here that referrals of situation by the SC under Chapter VII could even be made in case of a situation prevailing in the non-party state, i.e. even in the State which is not party to the Rome Statute. In such a scenario, the concerned State will have to cooperate with the Court as it is obligated to do so under the UN charter\textsuperscript{31}. Some States at the Rome Conference opposed any involvement of the Council in the operations of the ICC.

The Security Council may also further enhance the jurisdiction of the Court in case of act of aggression, which though has not been defined under the Rome Statute. However, the SC may consider a situation as an act of aggression deriving force under Chapter VII of the charter. The Security Council while making determination of a situation amounting to the act of aggression would take into consideration the definition of aggression adopted by the General Assembly in 1974. The definition of aggression under the G.A. Resolution entails state responsibility for aggression, but the Rome Statute mentions only individual criminal responsibility. It seems that in such a situation it will be the discretion of the Security Council to refer the case of aggression under the Rome Statute. Examining the role of Security Council under the UN charter, we may say that it's a political function of the SC to make determination of a situation as act of aggression under Chapter VII of the UN charter. However, the Rome Statute has failed to distinguish between the political function of the SC and the legal function of the ICC as a judicial institution\textsuperscript{32}.

Though considering that the referral of a case by the SC is more likely to be a result of the sway of the political situation, it seems reasonable to conclude that the independent power of a prosecutor to initiate an investigation \textit{proprio motu} is not indispensable for effective functioning of the ICC\textsuperscript{33}. It cannot be denied that there is a room for an individual prosecutor to be influenced by the political, emotional and other motives of extra-judicial character. It was essential to confer power on the SC or the state party to the Statute to initiate

\textsuperscript{31} See UN charter, Article 103
\textsuperscript{32} See Prof. Hisashi Owada, \textit{The Creation of the International Criminal Court - A Critical Analysis}, at p 26
\textsuperscript{33} \textit{Ibid}
proceedings in the Court. Otherwise, if such a power is left to the prosecutor; he alone would have acquired unbridled power for initiating investigation or prohibiting or even scuttling prohibition. It needs to be clarified that no special treatment is to be given to the referral by the SC under the Rome Statute. The Court may not prosecute if there is no prima facie case against the accused, even if the SC makes the referral. The procedure will be the same in case of referral by the SC as it would be in case of referral by the State party.

Even Prof. Crawford had remarked in earlier ILC Draft Statute that, "Once a crime has been referred by the SC; the normal requirements of the Statute will apply, including independent prosecution, and the principle of legality (nullum crimen sine lege...). In other words, although the SC may initiate proceedings, the source of law to be applied will be the same as if the complaint were lodged by a State"34.

It is important to mention that the first ever referral by the Security Council in the short history of the ICC has already been made under Article 13 (b) of the Rome Statute in relation to Darfur. The Security Council referred the situation in its Resolution 156435 which called for the international investigation of the crime of genocide. In fact the SC Resolution 1564 calling for an international investigation into the reports of genocide and crimes against humanity in Sudanese province of Darfur was partly prompted by the US declaration of genocide in Darfur. It was on Sept. 9, 2004, that the Secretary of State Colin Powell proclaimed that genocide had been taking place in Sudan and that the Government of Khartoum, known as National Islamic Front (NIF), along with Government-sponsored Arab militias, called Janjaweed, “bear responsibility” for rapes, killings and other abuses that have left over a million Sudanese homeless. The SC Resolution had asked Secretary General Kofi Annan to ‘rapidly establish an International Commission of Inquiry’ in order to

investigate reports of violations of international humanitarian and human rights law in Darfur to determine whether or not acts of genocide have occurred. The report of the International Commission of Inquiry established both "the Govt. of Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law." Subsequent to the report submitted by the Commission of Inquiry, SC referred the case to the ICC under Article 13 (b).

For the kind of situation that arose in Sudan, the exercise of jurisdiction by the ICC is well justified. Although the Rome Statute does provide for the principle of complementarity where the national jurisdiction is given primacy over the jurisdiction to be exercised by the Court, but the principle further provides that the Court shall exercise its jurisdiction wherein the State is unwilling or unable genuinely to carry out the investigation or prosecution. And in the present situation in Darfur, there was an alleged involvement of Sudanese Government in the mass atrocities and apparent control of judiciary by the military government, which shows that the situation was perfect for the ICC to handle.

Analyzing the principle of complementarity in the light of Article 13 (b), where the SC can refer the matter to the ICC acting under Chapter VII of the UN charter, at the outset it seems that this power of referral given to the SC under the Rome Statute limits the principle of complementarity. For instance, the SC may refer a situation to the ICC, acting under chapter VII, in which case the member states of the UN will be bound to carry out and accept the decisions

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38 See Rome Statute Article 17(1)(a), which provides that the Court shall determine that a case is inadmissible where the case is being investigated or prosecuted by a State, which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.
of the Security Council\(^{39}\), even if the state is willing or able to exercise jurisdiction in that particular case. As already explained, Article 25 of the charter provides that the members states of the UN are bound to accept the decisions of the SC. Therefore, the power of referral by the SC under Article 13 (b) read with Article 25 of the UN charter and Chapter VII of the charter apparently seems to supercede the right of complementarity. Further, Article 103 of the charter specifies that the members of the UN are obligated to comply with the orders of the SC, even if for that matter any other international agreement (which would also include the Rome Statute) suggests otherwise. Therefore it seems that Article 13 (b) of the Statute limits the scope of the principle of complementarity under the Rome Statute. The power of the SC under the above discussed provision is very wide. It undermines the sovereignty of a state, where even if a state is willing or able to exercise jurisdiction over crimes within its courts' jurisdiction, cannot do so in case the SC takes action under chapter VII and refers the situation to the ICC.

The principle, which would have enticed more states to becomes a member of the ICC, is having in fact a deterring effect on them to become the members of the ICC, as it will allow back door entry of the SC decisions into the ICC functioning. The provision has made the position of the SC very strong, not only in international politics, but also in international criminal law. Though this concern of the states is not without reason, help can be sought from Article 17 of the Rome Statute. However, if we analyze Article 17 of the Rome Statute, it provides that the Court shall determine whether a case is inadmissible or not. Therefore, even if there is a referral by the SC under Article 13 (b), the Court still retains power to determine whether the case is admissible or not. Therefore the provision should not discourage or dissuade the states willing to become members of the ICC, on the ground that their sovereignty will be undermined by the SC’s power under the Statute. But this is a matter of argument that the ambiguity at this stage in the relationship between the SC and the ICC under the Rome Statute cannot be ruled out till we are able to

\(^{39}\) See UN charter, Article 25
see the practical implications in any concrete situation. The crisis in Darfur is a big challenge for the ICC. The world will see the working and efficiency of the ICC in this case, and whether it will be able to maintain or restore peace in the area and bring justice.

4.4. Deferral of Investigation or Prosecution by Security Council resolution under the Rome Statute

The power of referral of a situation by the Security Council has already been discussed above which is provided under Article 13(b) of the Rome Statute. Another important role or rather discretionary power provided for under the Rome Statute (the Statute) is Security Council’s (SC) power to defer investigation or prosecution by adopting resolution under chapter VII.

Article 16 of the Statute provides, ‘no investigation or prosecution may be commenced or proceeded with under this statute for a period of twelve months after the Security Council in a resolution adopted under Chapter VII of the charter of the UN, has requested the court to that effect; that request may be renewed by the Council under the same conditions’.

The above provision has been the source of debate ever since its proposal at the ICC Conference of plenipotentiaries because of the adverse affects that it may have on international justice. The above provision on deferral by the SC is deemed to negatively frustrate the ICC’s powers. At the time of drafting of Article 16, the drafters intended to lessen the Council’s powers. It is, at present, a product of many compromises and is better than the initial International Law Commission’s proposal where the ICC was slated to be dependent upon the Council and subordinate to its action. Help may also be

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40 Rome Statute, Article 16
42 Supra note 40
44 ibid
sought from the fact that the provision was necessary since the purpose of creating an ICC is also to contribute to maintaining international peace and security and the role of SC, which is already tasked with such a responsibility under the UN charter, had to be, highlighted in the statute as well.

The SC, under Article 16, may request the ICC not to investigate or proceed with prosecution when it feels that the judicial action or threat of it might defeat council's efforts to maintain international peace and justice pursuant to UN charter. The provision only mentions deferring of investigation or prosecution on the request by the SC. In the normal course, the procedure for the prosecutor to initiate investigation would start with when a situation is referred to it by the state party, or the SC or *proprio motu* (under Article 13). Once the situation is referred to the prosecutor, he would examine the information available, before he proceeds with the investigation. The prosecutor would conduct the preliminary examination to find out prima facie case to proceed with the investigation. Therefore, it is important to note that before actual investigation is started, there is some initial examination/evaluation of the situation, which is probably not barred in case of deferral of investigation on the request of SC acting under Chapter VII. However, it cannot be said with full certainty whether such steps that involves preliminary examination of the situation before investigation could be proceeded with by the Prosecutor. This still needs some clarification. Such preliminary examination will not only include evaluation of the information made available, but it would also include the information sought from states, organs of the UN, intergovernmental or non-governmental organizations, or other reliable sources. Apart from the above, the preliminary examination would include the written or oral testimony received at the seat of the court. Though the said provision seems ambiguous but it must be remembered that rather than pointing out faults in the Rome Statute, the thrust should be to make it work. And it is possible if there is harmonious interpretation of the provision, i.e. where the need arises the Prosecutor should be allowed to carry out the initial examination, so that in case some information is received at the seat of the
court, it should be preserved for further reference since such information may not be made available to the ICC after the time limit of deferral is over.

Article 16 further implies that the SC resolution may not only prevent (or defer) the start of the investigation but once initiated (or started) it may also stop the investigation or prosecution that is already going on. The questions that arise, in case of deferral of prosecution when investigations have already started, are - What does the Court do with the person who has already surrendered to the court pursuant to a surrender request under Article 89 (1) of the statute? And also, whether a person, who is already in custody pursuant to investigation, is to be kept in custody for the period of twelve months, i.e. till the time the prosecution is deferred in the first instance. Besides, there is no guarantee that the deferral will not be renewed. The provision also provides for further renewal of the deferral. In such a case what shall happen to the human rights of such a person? Does that person have a right to be released and if yes, then will the court have to re-investigate the entire case and issue the arrest warrants for his arrest after the time of deferral expires? Furthermore, the need will be to preserve the evidence collected at the time of initial investigation. Again the question arises till when the court should preserve those evidences as there can anyways be a possibility of renewal of deferral. The parties need to draft the precautionary measures to handle such a situation. The suggestion is that in the Rules of Procedure and Evidence, the question relating to the preservation of evidence in case of deferrals can be addressed so that such evidences are allowed to come on the records.

As mentioned above, the Rome Statute in Article 16 provides for the renewal of request for deferral under similar conditions, but it is very important to note that the provision does not specify as to how many renewals should be allowed. It is very important to limit this power of deferral because otherwise it would mean that SC may exercise its discretion under Chapter VII, so long as the situation that threatens international peace and security persists. Such indefinite deferral of investigation of a situation or prosecution of those who are accused of such serious crimes would defeat the ends of justice.
Such a wide power will not only defeat the very purpose of having an independent court, but will also harm the independence of the court. Independence of judiciary is the most important feature of national as well as international justice mechanism; this principle keeps the hopes of the victims intact that they will get justice. To keep the integrity of international court, it is essential that the power to request renewal of deferrals by the SC be limited.

It is admitted that it is equally important to bestow the power on the SC to refer a situation for initiating proceedings as provided under Article 13 and also to confer power on it to defer the investigation or prosecution. However, it should be done in rare cases and to that effect; certain specific regulations need to be incorporated in the Statute. It is concededly essential that SC is empowered under the Rome Statute because of the functional similarity between the two organs i.e. maintenance international peace and security. For that end it must be endowed with the power to take action for referring a situation or deferring the investigation, but it should not be enlarged to such an extent as to defeat the very purpose of having an independent criminal court.

Security Council has already adopted a resolution pursuant to its power under Article 16, where it has used its deferral power under the Rome Statute. The situation, circumstances and the pressure under which the SC resolution 1422 was adopted needs to be highlighted. The resolution has also been renewed after its first term of twelve months period. Lord Acton rightly remarked in 1887, and his remark is a well-known phrase now. He said, ‘Power tends to corrupt, and absolute power corrupts absolutely’. Therefore our endeavor should be not to give absolute power either to an individual or to any institution, even if for that matter, it is to the Security Council (under the Rome Statute).
First Deferral by the Security Council under Article 16: Resolution 1422.

On July 12, 2002 the Security Council adopted resolution 1422 under Article 16 of the Rome Statute. The Resolution paralyzed the International Criminal Court's jurisdiction over US soldiers' participating in the peacekeeping operations in Bosnia and Herzegovina. The original draft resolution intended to protect only the U.S. forces, but due to widespread criticism against the U.S., the Council adopted the current resolution protecting not only the U.S soldiers but also non-member countries of the Rome Treaty from lawsuits under the ICC statute. Resolution 1422 exempts "current or former officials or personnel from a contributing [non-party state] to the Rome Statute from standing trial before the ICC for a renewal one year period beginning July 1, 2002. The resolution impedes the ICC prosecutor from commencing or continuing an investigation or prosecuting the troops whenever any case arises pursuant to Article 6, 7 & 8 of the ICC Statute. Paragraph 1 of the SC Resolution 1422 specifically provides that the period shall commence from July 1, 2002 for 12 months. Further Paragraph 2 states that the Security Council intents to renew the request in Paragraph 1 under the same conditions each 1st of July for further 12-month periods for as long as may be necessary.

It must be noted that the Rome Statute came into force on July 1, 2002. On the same day the Security Council resolution under the Rome Statute also came into force. It can be inferred that the sole purpose of adopting the resolution was to paralyze the working of the court. The SC seems to have abused the provision under Article 16 by adopting resolution 1422. The U.S. delegation to the SC started working towards this policy goal even prior to the

45 Supra note 43 at 1509
46 Ibid
47 S.C Resolution 1422, Paragraph 1 states, “The Security Council requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing state not a party to the Rome Statute, over acts or omissions relating to a United Nations established or authorized operation, shall for a 12-month period starting July 1, 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise”
entry into force of the Rome Statute\textsuperscript{48}. From May 2002, efforts were being made to introduce immunity provisions for peacekeepers, which later took the form of Security Council Resolution.

The resolution invited a lot of criticism from the international community. Though at the outset it seems that the resolution is adopted by consensus; but when the actual position is examined, it comes to the forefront that it was because of the pressure from the U.S that Resolution 1422 was passed. The Mexican UN Ambassador, Adolfo Aguilar Zinser, stated before the vote on Resolution 1422 that, "the general opinion of the international community is that this is wrong"\textsuperscript{49}. If the Council would not accept the proposal of the U.S., then the U.S. threatened to use its veto power to stop further renewal of period of their peacekeeping mission in Bosnia and Herzegovina, which was to expire on July 15, 2002\textsuperscript{50}. It was therefore, under pressure from the U.S that the SC had to adopt Resolution 1422 three days prior to this expiry of the period of peacekeeping mission. U.S. Government feared that their soldiers who were participating in the peacekeeping mission could be prosecuted under the Rome Statute of the ICC. Though U.S. is a non-party to the Rome Statute, but even then pursuant to Article 12 (2) (a)\textsuperscript{51}, the ICC can prosecute those who commit crime in the territory of the state, which is a party to the Rome Statute, and in the present case Bosnia and Herzegovina is party to the Rome Statute. Under Article 12 (2) (a), the Court can exercise jurisdiction on the basis of principle of territoriality, i.e. over persons (nationals even of non-party states) who are accused of having committed crimes within court's jurisdiction, in the territory of a state, which is a party to the Statute. It was the fear of the U.S that led to the adoption of the resolution.

\textsuperscript{48} Zsuzsanna Deen-Racsmany, \textit{The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council?} Netherlands International Law Review (2002), XLIX: 353 – 388, T.M.C. Asser Instituut and Contributors, at p 355
\textsuperscript{49} ibid
\textsuperscript{50} Supra note 45
\textsuperscript{51} Rome Statute, Article 12(2)(a) provides, "In the case of Article 13, paragraph (a) [when the situation is referred to the Prosecutor by a State Party] or (c)[when the Prosecutor has initiated an investigation \textit{suo motu}], the Court may exercise its jurisdiction if one or more of the following States are parties to this Statute or have accepted jurisdiction of the court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.
The U.S. Ambassador David Scheffer, who led U.S. delegation in Rome, was very clear during drafting negotiation on this account.

The U.S. Ambassador said\textsuperscript{52}, "Our military forces are often called upon to engage overseas in conflict situations \ldots\ldots\ldots we have to be extremely careful that this proposal does not limit the capacity of our armed forces to legitimately operate internationally. We have to be careful that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power".

The U.S.'s preventive measures angered the international community\textsuperscript{53}.

The non - SC member Canadian UN Ambassador, Paul Heinbecker called July 12, a 'sad day for the UN'. He accused US of having acted \textit{ultra-vires} in interpreting a multilateral treaty and creating a class of people not bound by law\textsuperscript{54}.

It is amazing to find out as to how U.S., which is a non-party State, prompted the SC to adopt a resolution, which would make the Rome Statute inapplicable for its own citizens. This shows that such loopholes in the Statute do not only undermine the independence of judiciary (here the ICC) but they largely affect its integrity as an impartial court for the reason that the Court will not be able to exercise its jurisdiction over certain class of people who are guilty of serious crimes, but will exercise jurisdiction over rest of the world community accused of similar crimes.

\textsuperscript{54} Supra note 48
In an open meeting of the Security Council on 10 July 2002, more than 100 UN member-states made statements opposing the adoption of Resolution 1422 and declaring that it was contrary to international law55.

This issue needs serious consideration by the international community. The question that needs to be considered here is whether ICC can be empowered to review the resolutions passed by the SC under chapter VII of the charter? It is relevant to do so because the Security Council has been given such wide powers that even impede the jurisdiction of the ICC. Article 16 does not limit the number of times a deferral request may be renewed, which could be read literally to permit infinite renewals. Such an interpretation is very dangerous and may ultimately block the ICC’s jurisdiction over many cases56. Therefore, it is imperative that the number of times of renewals of deferral request is restricted so that it does not delay or frustrate in some cases, the ICC’s power to exercise its jurisdiction. It is a well-known phrase which is often used in the administration of justice that, "Justice Delayed is Justice Denied". Delay in disposal of cases hampers the cause of justice. The gravity of the offence is often lost with the passage of time in public memory. However, the wounds of those who have been the victim only grow deep with every passing day in which justice is not done or delayed. Therefore, criminal justice system even under international framework must provide for speedy and effective justice. To achieve this goal, the ICC must be given power to exercise its jurisdiction without any delay. The international community should be vigilant against any attack on the independence of judiciary so that the victims do not lose confidence in this august institution.

It needs to be highlighted that SC Resolution was renewed on June 12, 2003 as Resolution 1487. The UN Secretary-General voiced serious concerns about the resolution stating "...allow me to express the hope that this does not become an annual routine. If it did, I fear the world would interpret it as

56 Supra note 52 at 1515
meaning that the Council wished to claim absolute and permanent immunity for people serving in the operations it establishes or authorizes. If that were to happen, it would undermine not only the authority of the ICC but also the authority of the Council and the legitimacy of United Nations peacekeeping."

Later in May 2004, the US introduced Resolution 1487 for renewal without modifying the text. At this time again, the world community objected to it and the UN Secretary General Kofi Annan made a strong statement against renewal saying that it would be unfortunate for one to press for such an exemption given the prisoner abuse in Iraq. He further added that it would discredit the Council and the United Nations that stands for rule of law and the primacy of rule of law. He urged the Council not to renew this measure and emphasized to promote the ‘rule of law in international affairs’.

With such strong opposition from the Chair and the international community, the US had to withdraw the resolution in 2004. Following the US announcement, the Secretary General issued a statement expressing his belief that “the decision by the US on this matter will help maintain the unity of the Security Council at a time when it faces difficult challenges”.

Another suggestion is to give power to the ICC for judicial review of the SC resolutions. Although this would invite criticism from those nations that hold power at the Security Council since it will give the ICC an upper hand over the measures take by the five permanent members in the SC. Though loosely, the ICC is competent under Article 19 (1) and Article 119(1) to decide its jurisdiction and admissibility of a case. In ascertaining its jurisdiction, the ICC can exercise a review of the SC resolution that whether the resolution for deferral has been actually passed under Chapter VII. In case the Court decides that the resolution is not passed under Chapter VII as required by the

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57 See http://www.iccnow.org/
58 Rome Statute, Article 19 (1) provides, ‘The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with Article 17’.
59 Rome Statute, Article 119(1) provides, ‘Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court’.
Rome Statute, the Court may on its own motion under Article 19(1), determine the admissibility of the case and take notice of the same. But if the Court finds out that the resolution for deferral complies with the requirements under Chapter VII of the charter, then the Court will have to defer the investigation or the prosecution as the case may be. The review is only limited to the rule "competence de la competence", according to which a court determines itself whether a particular cause of action is within its remit, and once the court decides that it is outside its competence, then it cannot exercise its jurisdiction.60

The Rome Statute on one hand confers jurisdiction on the Court to try the most serious crimes known to the humankind and on the other hand, it takes away its jurisdiction under Article 16 by giving power to the SC to defer investigations or prosecutions, thereby pre-empting the exercise of jurisdiction by the ICC. In fact, such a provision in the Statute adversely hampered the normal functioning of the Court. This would further enhance the position of the veto power nations and their allied vis-à-vis the ICC and would whip the poor nations who are politically bankrupt in international law.

It is important that the ICC should be empowered in such a way that it fights impunity, impartially and without any pressure from any outside institution. The world community must collectively think to confer the power of judicial review to the ICC to review the SC resolutions thereby supporting the principle of the ‘international rule of law’. This would help the court to smoothly exercise its jurisdiction over the most horrific crimes and prosecute the guilty so that peace prevails in the world.

It will be in the interest of ensuring world peace if the SC and the ICC act harmoniously and not try to undermine each other which will in fact contribute

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60 However, the only problem is the language of Article 19 which talks about the competence of the Court to decide its jurisdiction but not that of the Prosecutor to investigate a case. Thus, either SC resolutions with respect to the deferrals should be made reviewable by the ICJ with mandatory jurisdiction by incorporating amendments in the UN charter and the ICJ statute or the mandate of Article 19 of the Rome Statute be enlarged to specifically include deferrals requests.
towards maintenance and restoration of peace and security. The Security Council can play a very constructive role in the problem of enforcement of ICC decisions. There seems to be a serious potential problem with regard to the enforcement of decisions of the ICC, which the SC could remedy. The SC can enforce the decisions of ICC by using its Chapter VII powers creatively and by consistent practice of making Article 3961 determinations that the failure by a State to cooperate with the ICC constitutes a threat to international peace and security and thus it constitutes a basis for imposition of Chapter VII sanctions against the recalcitrant State62. In this case, the Security Council does not require a request from the ICC pursuant to Article 87 (7)63 of the Statute in order to exercise powers under Chapter VII. Only if the SC determines that non-compliance of the decision of the ICC amounts to a threat to international peace and security, the SC can take enforcement measures under Chapter VII, by imposing sanctions on the defaulting State. Therefore, a pro-active role for the SC may prove necessary in order to ensure effective enforcement of ICC decisions vis-à-vis both state parties and non-States Parties - a role that goes beyond that which is envisaged in the ICC statute.

61 UN charter, Article 39 states that 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 take in accordance with Article 41 and 42, to maintain or restore international peace and security.


63 Rome Statute, Article 87 (7) provides that ‘where a State party fails to comply with a request to cooperate by the Court contrary to provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council’.