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PEACE AND JUSTICE: A BALANCE OF POWERS

OPPORTUNITIES AND CHALLENGES IN THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE UN SECURITY COUNCIL

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ACADEMIC YEAR

2018/2019

"***We must learn, there is not safe heaven for life and freedom if we fail to protect the rights of any person in any country of the world***".

Luis Moreno Ocampo, First Chief Prosecutor of the International Criminal Court.

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1.1 Introduction

What really matters, when dealing with crimes considered of international gravity such as the crime of Genocide, crimes of war, crimes of aggression and crimes against humanity, is the criminal liability, the sources of law applicable for the punishment and the independence of the judicial actor that possesses the duty to prosecute such violations.
After having shortly described the history of the international criminal justice during the last two centuries, this thesis has the very first objective to analyse from a theoretical perspective all the instruments useful in the first-instance analysis when dealing with the existence of mass atrocities, the range of intervention the international community has, as well as the legal possibilities to punish the offenders of such crimes, introducing and analysing the only permanent international institution with the conferred authority to make justice in case of the most serious international human rights' violations: the International Criminal Court. ("ICC")
In the last 17 years, since its creation, the ICC has turned from a Court on paper into a leading actor in the area of enforcement of the international criminal justice. The ICC has active cases in all stages of proceedings, all triggering mechanisms of the ICC jurisdiction have been activated and it possesses a very large body of jurisprudence already on a variety of legal issues. Over the past 70 years, the nature and the context of the efforts to hold perpetrators of mass atrocities accountable have changed significantly. Nuremberg and Tokyo were purely *ex post facto* tribunals set up in reaction to atrocities that had already occurred. Their central purpose was punishment to achieve true justice. So were many other UN *ad hoc* tribunals, however the growing focus on such efforts marked a departure from earlier years and now international criminal justice should not only be about the punishment of crimes but about helping societies to build a stable future. The traditional concept of criminal justice has somehow expanded conceptually to include those new elements that are part not only of our past but, above all, of our future.
What makes the long-term significance of the Rome Statute's system fundamentally different from earlier efforts is its potential for the prevention of future crimes. The potential for preventive effect appears in several different forms, perhaps under the broad heading of inhibition, timely intervention, stabilization and norm setting. The deterrent effect can be easily expressed in these concrete terms: a public announcement that the ICC's Prosecutor is following a situation very closely can be a powerful tool putting

potential perpetrators on notice that they may be held liable for their actions and could be subject to arrest warrant enforceable in 123 States parties. Warning of this kind can boost the ICC's deterrent effect, its intervention can also draw local as well as international attention to the situation and help the relevant stakeholders to take necessary actions and to defuse actions to prevent atrocities. Another aspect of the ICC's preventive potential is the Court's ability to make a timely intervention in active situations with no prior approval of any political organs to investigate the crimes under its jurisdiction.

The ICC's intervention can take several forms escalating from a preliminary examination through an investigation to the issuance of arrest warrants and prosecution. By the way, what is important to remember is that holding trials before the ICC should be the last available tool and not a goal in itself.

Through its proceedings the ICC becomes a factor in the broader efforts to outlaw and eradicate grave breaches of international humanitarian law and to help societies overcome legacy of such crimes. The capacity of international criminal justice is to contribute to long-term peace stability and sustainable development in post-conflict societies. These are fundamental guarantees for a future free of violence. Here, the connexion between peace and justice is well recognized because they are not, or the should not be, mutually exclusive, on the contrary they reinforce each other. Indeed, peace is the most fundamental precondition of stability and development but there is no sustainable peace without justice, which whether delivered by domestic or international institutions is a necessary tool for the stabilization of peace. Accountability for past atrocities and strengthening of the rule of law are two key ingredients in the healing of post-conflict societies to enable a more comprehensive process of justice. Two very innovative approaches have been introduced for the empowerment of victims: first of all, the ICC is the first international judicial body to allow participation of victims as such and not just as witnesses. Victims have now become actors in international proceedings designed to prosecute those crimes. Along with this, the Rome Statute pays a special attention to the needs of women and children because they are often two vulnerable victims of atrocities.

Another innovative feature of the ICC is the creation of a trust fund for victims recognizing both rights and needs of the victims and their families. The funding power of the victims is to become key stakeholders in the pursuit of transitional justice. The fund has been able to articulate a truly human dimension to the process of international criminal justice. Lasting peace and prosperity in the post-conflict societies can only be achieved if challenges faced by the developmental assistance agencies and justice enforcement are addressed in a coordinated manner.

The adoption of the Rome Statute to create the ICC led to the development of an entirely new paradigm of international criminal law which has made accountability for atrocity crimes an integral question of the rule of law. In the long-term the Rome Statute's system has an important role in entrenching the values of peace, justice and the rule of law into the political, cultural, social and legal landscape around the world.

A fundamental part of this analysis will be focused on the United Nations, the international actor that started the long process that led to the creation of the Court and the relationship between them, which is still today, after seventeen years from the entry into force of the Rome Statute, quite controversial.
Specifically, this work will focus on the United Nations Security Council ("UNSC") and the practise of referring situations to the Prosecutor of the ICC, whereas from a juridical point of view, the UN Charter and the Rome Statute will be analysed for what concern the legal elements necessary for the description of such balance of powers between the Court and the UNSC and most importantly, for the capacity of the Court to make violators of human rights really accountable. It follows a description of the general framework in which the ICC has worked and the specific resolutions of the UN Security Council that gave birth to controversial challenges to the independence of the Court and the politically motivated influence of the UNSC Permanent Members ("P5") in terms of peace and justice.
It is argued here, the Security Council started to improve its, already huge, global influence after the creation of the Court with respect to other international actors. The possibility to refer a situation or to defer a case from the ICC gives the Security Council a discretional power that allows a greater control of the international sphere from prosecuting an individual accused to break the law to the possibility to threat States with investigation of nationals for the accusations of crimes considered of international gravity that would undermine their position in the international relations and mitigate their diplomatic influence. The research will try to understand whether or not the Security Council acted due to politically motivated schemes or just resorted to the ICC for pure values of justice and accountability.
It may be surprising to understand the thin thread that links the permanent members of the Council and their ability to sacrifice the sense of justice, which is the basis of the creation of the Court itself, to give precedence to all those geopolitical interests that characterize the world of diplomatic and international relations.
Finally, a revision of some legal element characterizing the relationship between the ICC and the UNSC is given to future investigations bearing also in mind the recent proposal for an Independent Expert Review of the Court, advanced by the Presidency of the International Criminal Court and dated May 2019.

1.2 A permanent International Tribunal

Taking into account that prosecutions for war crimes have been applied at least since the times of the ancient Greeks and probably even before that[1], we can affirm that common and socially accepted behaviours regarding human being values has always existed and have been always part of the social and political sphere. When we think at legal codifications for criminal liability must we move to earlier ages, starting for instance from the detailed text used by Abraham Lincoln during the American Civil War and prepared by the Columbia University Professor Francis Lieber; in which sanctions such as death penalty, were the very next consequence for act of aggressions and in particular for inhuman treatment. At an international level, an important step forward, but still not final, for the punishment of criminal behaviours was made by The Hague Conventions of 1899 and 1907, even though they were not supposed to create and codify criminal liability but much better to establish some kind of State's obligations and commitments. It was just a few years later that, The Hague Conventions were applied as a source of law in the description of war crimes and atrocities that have been committed during the Balkan Wars and later during the First World War. In any case, as well recalled by W.A. Schabas, it was not until the end of the Second World War at the Nuremberg trials, that the "Hague Law" has been used, specifically as source of law for criminal liability in the punishment of the violations of the Vienna Conventions and, most of all, looking at not leaving Nazi crimes unpunished. The same situation was then replied in the Pacific context, with the establishment of the International Military Tribunal aimed at prosecuting Japanese war crimes.

The International Law Commission, established by a UN Resolution[2], was called to draft the statute of an international criminal court in the same day the Genocide Convention was adopted[3], the first draft was officially presented in 1954 but by then and later on the assignment was suspended by the General Assembly considering all the several obstacles caused by the Cold War veil, that ended up covering the entire world and made steps in the direction of a real codification almost impossible. It is in 1994 that the Commission by mandate of the General Assembly succeeded in giving to the Assembly a draft statute for an international criminal court and then in 1996, in establishing a "Code of Crimes against the Peace and Security of Mankind" which contained all the definitions and legal principles that the draft of two years before left undefined. While the work for the creation of a permanent criminal tribunal was still in progress, the mass atrocities committed for the conflictual dissolution of the former Yugoslavia obliged the international community, namely the United Nations, under the pressure of NGOs and the civil society

[1] SCHABAS (2017:1).
[2] Resolution of the UN General Assembly of 21 November 1947, A/RES/174/II.
[3] SCHABAS (2017:8).

to act and establish in February 1993 an *ad hoc* tribunal for the judgement and punishment of such crimes.
Almost two years later in November 1994, the Security Council opted for the establishment of a second *ad hoc* tribunal as consequence of the serious violations and genocide crimes perpetrated in Rwanda.
Initially, both *ad hoc* tribunals shared the same jurisprudence as well as the same institution's composition, namely the same Prosecutor and the composition of the Appeals Chambers. It has been a great step in the jurisprudence of international criminal justice with respect to two fundamental points: the defence of human rights and the resulting punishment of their violations and, something which was not yet encompassed in the Nuremberg and Tokyo trials, the respect for due process.
Finally, the limitations of the temporal jurisdiction of the International Criminal Court made necessary the creation in 2002 of the Special Court for Sierra Leone[4] to assess responsibility for the atrocities committed in Sierra Leone during the 90's. Lastly, in 2007 the Special Tribunal for Lebanon, addressing the terrorist assassinations began in 2005 in the country, was established[5]. Several tribunals created to judge and punish criminal atrocities around the world made the establishment of a permanent tribunal a real necessity. The International Criminal Court is made up by four organs: The Presidency, the Judiciary, the Office of the Prosecutor and the Registry which provides logistical support to the other three parts of the Court.
The Presidency is responsible for the proper administration of the Court; it administers the Judiciary which is constituted by eighteen judges elected by the member States for a nine years-period mandate which cannot be renewed. We can affirm the Judiciary is the real core of the Court, which ultimately decides whether the accused individuals are innocent or guilty. The Office of the Prosecutor in particular, has to determine whether there is a reasonable basis to proceed with an investigation at a very preliminary stage. The Registry deals, as said, with all the logistical matters which make the Court run smoothly, from the hiring of translators through the victim's protection to the transport to The Hague.

[4] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002.
[5] Resolution of the UN Security Council of 30 May 2007, S/RES/1757.

1.3 The Rome Statute

The Rome Statute which establishes the International Criminal Court is the result of a long process of negotiations that saw in the diplomatic conference, that took place in the FAO headquarters in Rome on the 15th of June 1998, the last and final step. During this meeting over than 160 national delegations met, as well as hundreds among international organizations and NGOs.
The draft of the International Law Commission, was a fundamental starting-point for the negotiations, nonetheless were the efforts of the *ad hoc* Committee that put in place all the norms and principles become key points of the final document.
During the two meetings of the a*d hoc* Committee some new perspective was given to the legal basis of the future Court, introducing for instance the complementarity principle that sees the Court's prosecutor intervention as complementary to national legal systems and it is only when national courts are unwilling or unable to investigate[6] that a case is considered admissible before the ICC.
Another important element, to be discussed, is certainly the temporal clause of the Court making it a prospective one, defining once again the clear difference with the *ad hoc* tribunals of the past decades.
Nevertheless, the clear difference between the ICC and the *ad hoc* tribunals lies in the legal origin of this tribunals. On the one hand, the *ad hoc* Courts have been established by UNSC Resolutions whereas the ICC is not a UN organ rather its creation was possible thanks to an international agreement, taking the name of the Statute of Rome and setting a change to the international policies towards the crimes covered by it, creating also several controversies about the possible interpretations of the Court substantially dictated by political reasons and interests, mostly as we will see influenced by the UN Security Council.
The drafting process of the Rome Statute was a turning point for the international community because it gave birth to a system of values that we can, today *ex post*, define universally accepted.
During the negotiations the positions of the States, with regard to the norms to be inserted and the model on which to draw the Rome Statute, were different: on the one hand there was the influence of the like-minded States ("LMG") which supported the idea of a strong and independent Court, they were mostly middle power and developing States and did not want the Security Council to have a constant and decisive influence on the Court itself. During the negotiating process, they managed to unify more than 60 States from many parts of the world.
On the other hand, the traditional alliance of the Non-Aligned Movement ("NAM") and the SC were not able to maintain a single coherent position to the point that some NAM States requested (failing) the inclusion of the use of

[6] Statute of the International Criminal Court, Rome, 17 July 1998; Art.17(a).

nuclear weapons among the crimes defined in Article 5 of the Statute. In any case, the will of the P5 of the Council was clearly to have general control over all proceedings that might affect international security and peace which, as we shall see later, are entrusted to the Council under Chapter VII of the UN Charter.

In any case, what is really relevant is to note that the divisions present during the Conference were not dictated by classic partition schemes, such as the North and South of the world or great powers and developing countries, but rather the differences were based exclusively on national interests which, however, gave precedence, at least as far as the vast majority of States were concerned, to the system of values that I mentioned earlier, created thanks to the desire to want to give a turn, at least ethically, to the international criminal dynamics once and for all. A system of values that therefore overcame regional barriers thanks to a transcultural depth and that was a symbol of sharing those ideals that since the end of the Second World War were an immovable point of arrival.

1.3.1 Crimes covered by the Statute (art.5)

As mentioned, there were also different positions with regard to the crimes to be included in the normative structure of the Statute, mostly during the preparatory work of the Conference, in fact during the same Conference few controversies were highlighted on this issue. In this sense, the failed demands were mainly to include nuclear weapons as a possible crime as well as the inclusion of so-called transnational crimes. Both requests were not included in what should have been the crimes under the jurisdiction of the Court, in other words its subject-matter jurisdiction: international core crimes universally recognized as such.
In relation to this, it must be mentioned that the crime of aggression was finally included in article 5 but after the preparatory works was still outstanding: in fact additional requirements were established for its admissibility[7].
The crimes covered by the Statute of Rome are enshrined in article 5 which says:

> "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
>
> (a) The crime of Genocide;
> (b) Crimes against humanity;
> (c) War crimes;
> (d) The crime of aggression"[8].

When talking about Genocide, "the crime of crimes"[9] it is important for moral reasons to go back in time and explain quickly what led to a specific codified convention of this crime.
At the Nuremberg trials, the Nazi-leaders have been punished, among other crimes, for crimes against humanity specifically when the crime was that of genocide (as highlighted by the use of the term "genocide" by the prosecutors although not by the judges)[10] due to the lack of a specific legal codification related to it. For this reason, the efforts of the UN General Assembly started some months later and gave the expected results in December 1946, when a resolution passed and declared Genocide a crime against international law

[7] Rome Statute, 2002, Art.8bis.
[8] Rome Statute, 2002; Art.5.
[9] Judgement and Sentence of the ICTR of 4 September 1998, ICTR-97-23-S, *Kambanda*, para.16; Sentence of the ICTR of 2 February 1999, ICTR-98-39-S, *Serashago*, para. 15; Partial Dissenting Opinion of Judge Wald of the ICTY of 5 July 2001, IT-95-10-A, *Jelisić*, para. 1; Decision on Rule 98 bis Motion for Judgement of Acquittal of the ICTY of 31 October 2002, IT-97-29-T, *Stakić*, para. 22.
[10] SCHABAS (2017:87).

leading two years later to the adoption of the "Convention on the Prevention and Punishment of the Crime of Genocide"[11].
The same codified definition was restored without changes in article VI of the Rome Statute, which specifically deals with the Crime of Genocide.
Those who took the initiative in the General Assembly for the crime of Genocide to be codified and recognized as of international gravity, have had also the hope for a universal jurisdiction for such crime[12], a hope not successfully realized until today.
On the other hand, the final definition of crimes against humanity enshrined in the Statute of Rome is the last of several concepts that have been developed since the Nuremberg trials. What it is remarkable today lies in the fact that this kind of crime can be committed both in war and peace time, something not obvious, that is an important step towards a more complete codification of this crime which has been the centre of many controversies during the Nuremberg trials as well as during the Rome Conference.
At Nuremberg, the Allies were worried about considering crimes against humanity during peacetime punishable, due substantially to the treatments for minorities in their own countries and above all in all their colonies, that is why they established that crimes against humanity could have been committed only when related to one of the other crimes under the jurisdiction of the Nuremberg Tribunal; creating in fact a "nexus"[13] of crimes against humanity with crimes committed in an armed conflict.
The debate was then discussed again after the adoption of the Statute of the *ad hoc* Tribunal for the Former Yugoslavia in which article 5 gives jurisdiction to the Court to punish crimes against humanity when committed "in armed conflict, whether international or internal in character"[14]. "Obsolescent"[15] and "purely jurisdictional"[16] was, by the way, defined the "war nexus" by the Appeals Chambers.
We can affirm that Article 5 of the Rome Statute states the most advanced definition of Crimes Against Humanity even though, China and other Arab States, during the Rome Conference, pushed for declaring Crimes Against Humanity ("CAH") punishable only in an international armed conflict trying to go back in time to older definitions, a try which did not give the expected result.

[11] Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 1948.
[12] SCHABAS (2017:87).
[13] SCHABAS (2017:95).
[14] Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993, art. 5.
[15] Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction of the ICTY of 2 October 1995, IT-94-1-AR72, *Tadić*, para. 140.
[16] Judgement of the ICTY of 12 June 2002, IT-96-23 and IT-96-23/1-A, *Kunarac* et al., para.83.

1.3.2 Preconditions to the Exercise of Jurisdiction

The Preconditions for the Exercise of Jurisdiction enshrined in article 12 define the tight connection the Court has with States parties to the Rome Statute and States not parties that accept the jurisdiction of the Court for a specific situation, describing in which cases the Court has the legal basis to intervene in analysing the supposed crime in question.
Paragraph (1) of article 12 states: "A state which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5"[17]. As defined in this paragraph the Court will take into consideration only the crimes enshrined in article 5 which, as already explained, are considered of international concern and covered by the Statute namely crimes of Genocide, crimes of aggression, crimes against humanity and war crimes. The jurisdiction of the Court is limited in its subject-matter, not because there are no other crimes of international gravity which may be punishable but because those other crimes, by majority, are already well addressed by national courts or in any case not of sufficient gravity as the ones under the jurisdiction of the Court or because the new wave of international crimes still needs the establishment of a normative framework. In every case, what makes them similar is that the humanity as a whole is considered the victim and then it is legitimate to punish them internationally: this reasoning is valid for the ones covered by the ICC as well as for the ones today called "transnational crimes" such as slave trade, hijacking and terrorism[18].
Paragraph (2) recalling article 13 which deals with the exercise of jurisdiction of the Court assures that the Court may exercise its jurisdiction only if the States where the crimes occurred (territorial State), the States of which the person accused is a national (nationality State), are already members of the Rome Statute or have accepted its jurisdiction through a declaration lodged with the Registrar[19].
The territorial limitation is here expressed, a clause that demonstrates how difficult was and probably will ever be, to support international criminal justice when it means, as to say, devaluating national sovereignty.

[17] Rome Statute, 2002; art.12 (1).
[18] SCHABAS (2017:75).
[19] Rome Statute, 2002; Art.12 (2), (3).

1.3.2.1 Jurisdiction *Ratione Temporis* (art.11)

The prospective nature of the International Criminal Court makes it different from all the precedent tribunals that were created exactly to prosecute crimes occurred before their establishment.
The temporary clause enshrined in article 11 (1) of the Statute states that the Court has jurisdiction only over crimes occurred after the entry into force of the Rome Statute namely 1 July 2002[20].
To provide a more comprehensive framework supplementing the temporal jurisdiction of the Court the principles of international criminal law *nullum crimen nulla poena sine lege*[21] are incorporated specifically in the statements of article 22 and 23 as part of the General Principles of Criminal Law of the Statute.
In the first instance, the jurisdiction *ratione temporis* has to be considered a characteristic element of the proper nature of the Court which, as already noted, during the negotiating process, was foreseen exactly to be limited with respect to the past and to be prospective mostly because many States, even the most favourable to the creation of the Court, were not ready to be subject to any kind of possible prosecution.
Furthermore, the temporary clause goes more in depth establishing that the Court has jurisdiction over a State party to the Statute only if the crime in question is subsequent to the entry into force of the Statute for that State[22], that means, for instance, that Mexico which has ratified the Statute in October 2005, three years after its entry into force in July 2002, cannot be prosecuted for conduct prior of October 2005.
The temporal limitation of the Court is just one of the features agreed upon by the majority during the Rome Conference and it is the proof of a different perspective resulted by the creation of the ICC that moved away from the previous tribunals established with a specific mission, retroactively limited in time and geographically circumscribed to defined territories.

[20] Rome Statute, 2002; Art.11 (1).
[21] Rome Statute, 2002; Art.22; Art.23.
[22] Rome Statute, 2002; Art. 11 (2).

1.3.2.2 Jurisdiction *Ratione Loci* (art. 12.2a)

Article 12 (paragraph 2a) establishes that the Court has jurisdiction concerning crimes occurred on the territory of States parties, regardless of the nationality of the offender[23].
The other possibility for the Court to possess jurisdiction is through an *ad hoc* declaration of a State that temporarily accepts the jurisdiction of the Court for the crime in question[24].
What can be recalled here, is the initial difficulty to establish exactly what the word territory meant during the final negotiations. In the final version of the article it comprises the land territory of a State as well as board vessels or aircrafts registered to that State party[25]. This enlargement of the concept of territorial jurisdiction was quite well accepted during the negotiations of the Statute.
On the other side, what Schabas defines as "effects jurisdiction"[26], is referred to all the crimes that directly or indirectly provoke a collateral damage to the territory of a different State from the one in which those crimes are committed and which is not expressly enshrined in the Statute meaning that this concept was probably out of the plan for the majority of the States during the Conference but it is, instead, normatively included by several of them at a national level.
Finally, in the Rome Statute there is no provision that requires an effective control over a territory by a State. This requirement would limit the jurisdiction of the Court or, at least, would make it more difficult to be activated. It is up to the Court then to establish whether a territory, in spite of the effective control of it, is considered being inside the national borders of a State in cases of uncertainty.
The point here is the lack of universal jurisdiction by the ICC. Conceptually speaking, when an international judicial institution has the conferred power to prosecute crimes considered of global interest and of incomparable gravity should also be given the possibility to act globally for the sake of its very mandate. This element would by the way crash the secular concept of national sovereignty which is basically a starting-point notion and a fundamental pillar for every country in the world. Peace and justice again come to face the importance of each other as necessities for the welfare of humanity. The mutual exclusivity that for years was supposed to exist between these two aspects is, or is becoming, a mutual reinforcing relationship, a thin wire indeed which may be better addressed by the international community. What is clear, by the way, is that there is no peace without justice.

[23] SCHABAS (2017:66).
[24] Rome Statute, 2002; Art.12 (3).
[25] Rome Statute, 2002; Art.12 (2a).
[26] SCHABAS (2017:67).

1.3.2.3 Jurisdiction *Ratione Personae* (art. 12.2b)

The jurisdiction *ratione personae* stated in article 12 affirms that the Court may exercise its jurisdiction over a person, accused of having committed the crimes covered in the Statute, who is a national of a member State of the ICC or has accepted its jurisdiction according to paragraph 3[27]. It was the clearest form of jurisdiction the negotiators established during the Rome Conference, the minimum requirement to ensure a standard range of possible targets for the Court but still with some exceptions. The first exception is stated in article 26 which envisages the exclusion of jurisdiction over persons under eighteen at the time of the alleged commission of a crime[28].

The second issue and probably the most important refers to immunities. If on the one hand the Statute of Rome explicitly exclude any kind of privilege or immunity for official capacity as enshrined in article 27 titled "Irrelevance of Official Capacity"[29], on the other hand, in article 98, it expressly differentiates between the obligation of the States to cooperate with the Court but not to act inconsistently with obligations or agreements under international law[30].

Professor Bassiouni, chair of the Drafting Committee at the Rome Conference, during the analysis of these two provisions stated the possibility to have them unified in a single norm or article to avoid misinterpretations[31].

In the Statute of Rome, it is imaginable an expansion, for instance, of article 98 (1) to the personnel of the United Nations. This expansion can be proved in article 19 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations[32], which expressly recognizes immunities to officials of the United Nations. It can be justified by the strict relationship between the United Nations and the International Criminal Court bearing in mind the clear supremacy over the Rome's Statute of the UN Charter that itself recognizes privileges and immunities for all the "insiders" of the organization.

On the other side, the deterrent effect of the International Criminal Court, as stated by the Appeals Chambers, may be better understood and, effectively, put in practice only when it is all the spectrum of possible categories of

[27] Rome Statute, 2002; Art.12 2 (b).
[28] Rome Statute, 2002; Art.26.
[29] Rome Statute, 2002; Art.27.
[30] Rome Statute, 2002; Art.98.
[31] BASSIOUNI (2005a:84).
[32] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, New York, 2004.

perpetrators to be held accountable before the ICC[33], from highest-ranking leaders through persons in official capacity to simple citizens.

1.3.3 Exercise of Jurisdiction (art.13)

The provisions enshrined in article 13 on the Exercise of Jurisdiction by the ICC is another aspect that distinguishes the Court from all the previous *ad hoc* tribunals which, naturally, did not comprise the three triggering mechanisms agreed at the Rome Conference. In other words, the ICC has a pre-determined capacity and conferred authority to punish and to prosecute.
Article 13 states:

> "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) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
> b) 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; or
> c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15"[34].

According to this provision, at least one of this three triggering conditions needs to be satisfied for the exercise of the jurisdiction of the ICC. More interestingly, the positive responses of the Prosecutor and of the Pre-Trial Chamber are necessary, after a preliminary examination to confirm the admissibility of the case, to all the three mechanisms for the beginning of an investigation.
After a Security Council or State party referral or the Prosecutor acting *proprio motu* a preliminary examination is opened to determine whether or not there is a "reasonable basis"[35] to start the investigation.
In any case for the purposes of this work, the most important element in this context lies in the jurisdictional limit of the triggering mechanisms; for a State party referral or a *proprio motu* action of the Prosecutor to be valid the situation needs to be already under the jurisdiction of the Court whereas the

[33] Judgement on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I of the ICC of 13 July 2006, *Decision on the Prosecutor's Application for Warrants Arrest, Article 58*, para.73, case ICC-01/04, *Situation in the Democratic Republic of Congo*.
[34] Rome Statute, 2002; Art.13.
[35] Rome Statute, 2002, Art. 18.

Security Council has the power to refer a case for which the Court lacks of territorial jurisdiction, as happened for the referrals in Sudan and Libya. It is evident thus, the authority held by the Security Council that can overpass the jurisdictional barriers of the Court in order to refer a case that normally could not be taken into consideration by the ICC, always acting under Chapter VII of the UN Charter. The power of the Council to enlarge the jurisdiction of the Court is a necessary element for the Council to be able, in the logic of its role with the court, to effectively fulfil its mandate under the Charter. In this sense, the Court enjoys universal jurisdiction, if only the Council were a democratically equal body and therefore legitimate in its work, probably the cases referred to the Court would have been many more, allowing it to carry out the task for which it was created, an independent judicial body that complements the national jurisdictions and helps them to make responsible all those who are guilty of crimes of the worst kind.

1.3.3.1 State party Referral (art.14)

In spite of being enumerated as the first triggering mechanism, the State Party referral was always imagined as the less efficient one even during the Rome Conference foreseeing the scepticism of the States to bilaterally complain against other States. What was predicted to be an inefficient condition ended up introducing a systematic procedure at least during the first decade from the creation of the Court, namely the so called "self-referral".
The first one has been conducted by the Government of Uganda in 2003, even if as recalled by Schabas, it appeared clear it was the same Prosecutor of the ICC to ask the Uganda's Government for the referral, ensuring the prosecution of rebel forces leaders without taking into account any governmental participation[36].
After few months from the first self-referral in the history of the ICC, the Democratic Republic of the Congo submitted a referral request to the Registrar in March 2004. The Central African Republic followed the same procedure almost a year later in January 2005. Both referrals of Congo and CAR gave the go-ahead for the first trials at The Hague.
The 4th case was presented to the ICC in 2012 thanks to the self-referral of Mali formulated for the supposed inability of national courts to prosecute crimes committed in the north of the country.

[36] SCHABAS (2017:145).

"The referral must be in writing"[37] because it represents the political will of a State to cooperate, which may be already included in the ratification procedure of the Statute by a State but need, in any case, to be made explicit.
Even if on the one hand, national courts have a hierarchical priority over the ICC[38] and the history of the lifetime of the Court, in which many self-referrals have been registered to the ICC, makes evident the concrete positive intentions of many State parties to the Statute towards the Court, notwithstanding I feel comfortable with the idea of Gaeta when she affirms that:

> "The government authorities may be prepared to cooperate where the crimes investigated have been allegedly committed by the opposing side; in contrast, it is unlikely that they will be fully cooperative in the investigation of crimes perpetrated by state agents"[39].

1.3.3.2 Security Council Referral (art.13.b)

Security Council Referral is enshrined in Article 13 paragraph b which confers, jurisdictionally speaking, the power to the Court to open an investigation 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; or […]"[40].

When triggering the Court's jurisdiction, the Security Council must be acting under Chapter VII of the UN Charter, moreover another element needs to be mentioned: the Security Council can broaden the Court's jurisdiction geographically but it cannot trigger the ICC's jurisdiction for a case that does not respect the temporal clause of the Rome Statute, meaning that the UNSC cannot make the Court open an investigation over a crime occurred prior to the entry into force of the Rome Statute. It is quite clear then, that the Security Council possesses an important instrument to activate the ICC's investigations but at the same time it has to work within some jurisdictional limits it cannot overpass.
The referral of the Security Council was considered the most important instrument of the Statute of Rome to fight crimes of international gravity but ended up becoming the most debated norm of the Rome Statute not only for what concerns the legal nature of it but, above all, because of its politically

37 Rules of Procedure and Evidence of the International Criminal Court of 3-10 September 2002, ASP/1/3, pp.0-107, Rule 45.
38 Preamble to the Rome Statute (para. 6).
39 GAETA (2004:952).
40 Rome Statute, 2002; Art.13(b).

motivated use. The analysis needs to be more deep on the Security Council power to confer (and to defer) jurisdiction to the Court when the Court does not possess it, because on the one hand it can be showing the positive will the negotiating delegates had during the Rome Conference towards a more comprehensive international criminal justice but on the other hand, it represents, as many have already claimed, the free pass for the Security Council to control an independent judicial institution which should be a global defender of human rights free from every kind of influence, which *de facto*, it is not. Furthermore, it is useful now to remind that not all, among the permanent members of the Security Council, have ratified the Rome Statute but still maintain the power to trigger the ICC or to block actions, a process that seems to have some controversies in its basic conceptual foundation even more than its practical ones.
I leave a deep analysis of all the implications for a subsequent part of this thesis, when all the legal instruments and the events most debated have been defined and there should be, hopefully, a more complete context and a clearer background.

1.3.3.3 *Proprio Motu* Authority of the Prosecutor (art.15)

At the Rome Conference, the United States stated that an independent prosecutor with the power enshrined in the Statute to start an investigation *proprio motu:*

> "not only offers little by way of advancing the mandate of the Court and the principles of prosecutorial independence and effectiveness but also will make much more difficult the prosecutor's central task of thoroughly and fairly investigating the most egregious of crimes"[41].

China and Israel[42] were the other two countries most critical of the possible inclusion of such a trigger mechanism in the Rome Statute, both with the United States, justifying their position, accused the Prosecutor of lacking of accountability.
It is proof of the reluctance of many States to assign a real level of autonomy to the Court that could have questioned the position of these same States. Nor China, Israel or the United States ratified the Rome Statute.

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[41] Statement of the United States Delegation to the Rome Conference of 22 June 1998, *Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor p.1.*
[42] Press Release of the UN General Assembly of 2 November 1995, *Views on International Criminal Court Put Forward in Sixth Committee*, GA/L/2879.

The most accredited hypothesis is the fear of many States that showed cooperation, but as mentioned, were not ready to deal with possible investigations due to the *proprio motu* decision of the prosecutor.
What is more, the International Law Commission did not endow the *proprio motu* trigger mechanism of the Prosecutor in its Draft and it was considered as a lack of impartiality for the Court itself: the main motivation in support of this critic was the incapacity of the Court to investigate a situation without the complaint of a State or the Security Council meaning that every investigation would have been based on a politically motivated logic[43].
Until now, the Prosecutor acting *proprio motu* has activated fewer investigations than expected; one of the reasons for this is the economic difficulty of allocating Court's funds between the various departments, which, as we shall see, is closely linked to the United Nations and therefore this significantly reduces the investigative capacity of the Court itself. Secondly, another difficulty is represented by the complicated achievement of the evidence and witnesses necessary to start an investigation, taking into account the Court lacks of an enforcement power, therefore remaining subject to the consent and cooperation of the States that in many cases prove unwilling to provide any help.
In any case, legally speaking, the Pre-Trial Chamber must confirm that there is a reasonable basis to proceed with the investigation[44]:

> "[…]the reasonable basis standard means that there exist a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the court has been or is being committed"[45].

The Prosecutor's need of a *laissez-passer* after a preliminary examination *proprio motu* prevents a possible abuse of power by the Prosecutor himself, which was another point strongly debated during the negotiations. A balance between the power of the Prosecutor to open a preliminary investigation and the need of confirmation by the Pre-Trial Chambers in terms of subject-matter and jurisdictional admissibility seems to have been found in the final codification of article 15 of the Rome Treaty.

[43] SCHABAS (2017:158).
[44] SCHABAS (2017:160).
[45] *Ibidem.*

1.3.3.4 UN Security Council Deferral (art.16)

Article 16 of the Rome Statute represents the other aspect of the negotiations to have unleashed many controversies together with article 13 (b) (Security Council Referral) and that still today represents one of the most debated instruments in the relationship between peace and justice.
It states:

> "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter 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"[46].

Any consideration on the moral nature of such norm will be left for subsequent parts of this study, it is nonetheless, important to highlight that for both powers, to refer a case to the ICC and to defer one for security issues the Security Council must be acting under Chapter VII of the UN Charter. The interpretation here concerns the overpassing authority of the Council when referring a case for which the Court was not conferred jurisdiction upon by the States.
The Security Council as a global legislator in fact diminished the effective credibility of the Court to the eyes of the international community intended as States, as recalled by Aloisi (2013) who also remarked:

> "The deferral power, in particular, was based on the need to reconcile peace and justice in situations in which the presence of peace talks or security concerns makes justice a secondary goal to the international community"[47].

The Deferral power of the Security Council was thought to be a balancing instrument between peace and justice. When mass atrocities are committed on a territory under which the Court possesses jurisdiction, directly (Rome Statute's requisites) or indirectly (Referral of the UNSC) but the process of prosecuting and punishing the perpetrators may degenerate the country into social instability and thus incur new crimes, the role of the Security Council should be the way out in the relationship between peace and justice: moreover, until now, the process of stabilising a territory has always taken precedence over the need to punish the perpetrators of serious crimes.
The point here, assuming that astonishing progresses in the protection of human rights have been made in the last 80 years, is to clearly ensure at an

[46] Rome Statute, 2002; Art.16.
[47] ALOISI (2013).

international level a legal framework capable of punishing violations through formal procedures that respect the normative international legal order but without creating what Aidan Hehir and Anthony Lang define the problem of the Sheriff[48] that oversimplifying represents the problematic relationship between the Responsibility to Protect (hereafter also "R2P") and a well-balanced punishment for criminals as well as a positive peace's stabilization process.
As already noted, the ICC possesses a similar role to maintain peace and security in a global perspective holding those responsible for atrocities, bearing in mind that it is not a UN Organ as such, as were the *ad hoc* tribunals, rather an international institution established by an international agreement, put completely inside the international legal order.

1.3.4 The Admissibility of the ICC

The admissibility procedure is a *condicio sine qua non* of the International Criminal Court, that needs to be satisfied in every situation that comes before the Court whatever is the trigger mechanism that activated it.
The determination of admissibility in the first instance must overcome the jurisdictional barrier created by the primacy of national jurisdictions in the duty to prosecute the crimes covered by the Rome Statute. The admissibility requisites of the Court must be addressed even if no State addresses it and, on the contrary, does not need to be explicitly motivated by the Court because it possesses a certain degree of discretion when analysing the opening of an investigation.
The admissibility procedure can be easily described as made of three well-defined principles that need to be satisfied in order to start an investigation: the complementarity principle that distinguish the International Criminal Court from the *ad hoc* tribunals, the gravity principle and the *ne bis in idem* rule. All three norms are enshrined in article 17 of the Rome Statute.

[48] HEHIR, LANG (2015:154).

1.3.4.1 Issues of Admissibility (art.17)

With the creation of the International Criminal Court the relationship between national and international judicial systems witnessed the introduction of a new path according to which it is not anymore the primacy concept[49] of the *ad hoc* tribunals, which could arbitrarily decide to intervene without demonstrating any unwillingness or inability to genuinely prosecute by the national courts, but the complementarity principle that represents exactly the opposite norm. Article 17 paragraph 1 states:

> 1. "Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>   a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>   b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>   c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>   d) The case is not of sufficient gravity to justify further action by the Court"[50].

The paragraph in question establishes the three elements that can define the inadmissibility of a case. According to the complementarity principle (paragraph 1, subparagraphs (a) and (b)), national criminal jurisdictions must be in charge of prosecuting the most serious human rights violations and only when it is proved the inability or unwillingness of national courts to bring justice, the International Criminal Court can intervene assuming the responsibility to do it. The principle of complementarity and the process of adapting internal legal systems to the substantive part of the Rome Statute are two essential and mutually interconnected elements of the complex architecture governing the functioning of the International Criminal Court. While the existence of legislation capable of prosecuting statutory crimes at internal level appears to be a fundamental element in making the complementary nature of the International Criminal Court effectively operational, the way in which the principle of complementarity is interpreted by the International Criminal Court appears to be capable of substantially influencing both the way in which States implement statutory provisions in their domestic legal systems and the dynamics influencing the decision of States to transpose or not to transpose those provisions.

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[49] Statute of the ICTY of 1993, Art. 9(2), established by resolution of the UN Security Council of 25 May 1993, S/RES/827; Statute of the ICTR of 1994, Art. 8(2), established by resolution of the UN Security Council of 8 November 1994, S/RES/955.
[50] Rome Statute, 2002; Art.17(1).

Secondly, if the gravity of the crimes committed is not sufficient to justify the intervention of the International Criminal Court (paragraph 1 d), it will not bear responsibility to judge as also recalled in article 53 of the Rome Treaty concerning the initiation of an investigation[51]. The gravity norm of the Statute passed quite silently during the negotiations and in the years following the adoption of the Statute, because the substitution of the term "such" of the International Law Commission's ("ILC") draft with the term "sufficient" was imagined to reduce the situations in which the ICC was called to intervene, aimed at avoiding an enormous number of cases, many of them not probably enough grave for its intervention.

Last but not least, the Issues of Admissibility confirm the principle of international law *ne bis in idem*[52], enshrined in article 17 paragraph 1(c) and in article 20 of the Rome Statute, according to which no one can be prosecuted twice for the same crime or for a crime he is already being prosecuted.

[51] Rome Statute, 2002; Art.53.
[52] Rome Statute, 2002; Art.20.

2 The UN Security Council (UNSC)

2.1 Introduction

The power given to the United Nations by the founding States represented the will to put an end to the past atrocities and to begin a new international path that would bring about peaceful processes of stabilization and economic revival.
Specifically article 1 of the UN Charter in its first paragraph states:

> "The Purposes of the United Nations are:
>
> 1. 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; […]"[53]

If an organization is to achieve its goals it must have international legal personality. The Orthodox vision of an international organization limited to carrying out purely the tasks circumscribed by its constitution has grown over the years and represents the strongest limit for an international organization, even more so for the United Nations, and tends to favour clearly the founding States.
The criticism that many scholars have raised concerns the achievement of the objectives and purposes of the organization itself, in this case the United Nations, which can only be true, through a consequent constitutional expansion of the Charter, not allowing a strict control by each individual State, even more so if we take into account the very large number of commissions and subsidiary bodies that have been created under the Charter itself. All the more so if the lack of unanimity as the main method of voting within the bodies is also included in the debate.
It is therefore clear how a separate will has developed within the organization: if we take as an example Article 2 paragraph 7 of the Charter, according to which the organization can never intervene in domestic situations of a State unless it is provided for the intervention of the United Nations under chapter VII of the Charter[54] we note that the General Assembly and the Security Council have intervened several times in internal processes of a State in cases

[53] Charter of the United Nations, San Francisco, 24 October 1945, Article 1(1).
[54] Charter of the United Nations, San Francisco, 24 October 1945, Article 2(7).

not serious enough to fall under chapter VII, acting *ultra vires* violating the Charter and the principle of national sovereignty.
As argued by many scholars, the UN Security Council has developed an increasing central role in the international community since its establishment as one of the organs of the United Nations and the relationship with the other main organ of the UN, namely the General Assembly ("GA"), is still today under scholar's revision.
As noted by Anne Peters, "the different organs must observe the institutional balance and pay each other mutual due respect"[55].
UN Security Council has 15 members; UN General Assembly counts on 192 members.
While the General Assembly is democratic in the sense that each member, howsoever powerful he may be, has a single vote, the Security Council is made up, mainly, of 5 super powers of the world who can take unilateral actions based upon their veto's power.
The General Assembly deals in all matters except international peace and security, which is the customary domain of the Security Council and for which the General Assembly plays only an advisory role.
The resolutions passed by the Security Council are binding upon the member States while the General Assembly makes general observations only in lay man term, the UNSC is an executive body taking all the major decisions whereas the UNGA acts as a legislative body.
The UN Security Council has primary responsibility, under the UN Charter, for the maintenance of international peace and security[56]; it has been increasing its role and today has become an actor with a key international impact that can, greatly influence international dynamics.
The Security Council represents the international actor with the responsibility to protect as well as the obligation, by its very nature, to deal with all situations at the international level that call into question security and peace in the world. Through this primary task, the Security Council, as well as an executive role, seems to have developed over the years a legislative role that allows it to have a strong influence on the international legal order. The relationship with the International Criminal Court, an independent judicial body in fact included in the international normative jurisdiction, will be dealt with later with a focus on the balance of powers between the two cited international actors; rather now we limit ourselves on tracing the contours of the spectrum in which the Security Council acts, starting naturally from its legitimacy, which we find in the United Nations Charter.

[55] PETERS (2012:767).
[56] Charter of the United Nations, San Francisco, 24 October 1945, Article 24(1).

2.2 Positive Law: the UN Charter

The Charter of the United Nations which is an international treaty, was discussed during the San Francisco Conference that took place on the 25 April 1945 at the War Memorial and Performing Arts Centre by 50 countries, today the number of member States has gone up to 193 countries. It came into force on 25 October 1945 and marked the beginning of a new era in which peaceful cooperation between States became the method by which to achieve one of the main goal set by the international community and therefore by the organization: the maintenance of international peace and security.
The Charter, therefore, being an international agreement, does not escape the common rules on the interpretation of treaties and as laid down in Article 31(1) of the Vienna Convention: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[57].
One of the key debates in relation to the Charter of the United Nations is, in some circumstance, the lack of clearness in the interpretation of the statutory rules referring to the competence of the bodies of the United Nations.
Provided that there is no organ within the United Nations with specific binding competence for the other bodies and the member States to interpret the Charter, one can only cite in this sense the International Court of Justice which can issue opinions on any legal question and therefore also on interpretation-related issues without these being binding on the other bodies or on the member States; it is therefore clear how each organ can differently interpret the Charter when adopting concrete acts.
The question therefore arises spontaneously and relates to whether or not the interpretation of the Charter by an organ is binding on the member States, especially where its own powers are concerned.
If the answer was in the affirmative, the body in question would have complete freedom of choice as well as the chance to modify its interpretation of the same question even if only because of a change of internal majority or even it could violate the statutory rules without the possibility of annulment, justified by a particular interpretation of the Charter.
In any event, the fact that there is no explicit provision to give this freedom of interpretation to each organ seems to ensure a negative answer to the question, in the light of the great importance and impact that such provision would have.
In view of this, only acts which comply with the Charter are binding on the member States. The problem arises exactly when a given interpretation of a body may be challenged by a State as not conforming to the Charter.
Recalling the lack of an organ with specific and binding interpretative competence, the International Court of Justice issues non-binding opinions and is susceptible only at the request of another organ and not of the States, many scholars definitely believe that an act cannot be considered illegitimate

[57] Convention on the Law of Treaties, Vienna, 23 May 1969, Art. 31(1).

and therefore be challenged by a State if it has accepted it explicitly or implicitly (acquiescence) precisely according to the rule that agreements are binding if and to the extent that they have been implicitly or explicitly accepted.
In conclusion, it seems reasonable to believe that when a State explicitly challenges the legitimacy of an act, bearing in mind what has been said about the lack of an organ with a binding interpretative function, the act itself can be rejected by that State which is not affected by it.
The first chapter describes the purposes and principles of the UN: prevention of threats to peace, friendly relationships among countries respecting the equal rights for everyone and self-determination for people, fundamental freedoms and harmonization[58] are the key principles agreed upon by the founding countries in San Francisco showing the huge understanding of the need of stability, economic development, peace and justice that societies have been developing after the World War II.
Chapter II deals with the member States, Chapter III introduces the organs of the organization which are subsequently defined: to the General Assembly is dedicated Chapter IV, to the Security Council Chapter V.
The Charter of the United Nations establishes also the Social and Economic Council and the Trusteeship Council, the International Court of Justice and the Secretariat as the main organs of the organization. Their composition, the procedures and the powers are, respectively, enshrined in chapters XII, XIII, XIV and XV of the Charter.
For the purposes of this work, Chapter V and the rules that govern the Security Council are necessarily described more in depth in the light of its relation with the International Criminal Court.

[58] UN Charter, 1945, Art. 1.

2.2.1 Chapter V: The Security Council

2.2.1.1 Composition (art.23)

The Security Council shall consist of 15 members. 5 members are permanent, China, Russia, England, France and the United States; the other 10 are non-permanent members elected for a two-year term of office.
The composition, functions and powers of the Council are enshrined in Chapter V of the Charter of the United Nations from article 23 to 32.
Article 23 deals with the composition of the Council, with each member of the Council having one representative. Among the criteria for the allocation of non-permanent members, the most important is a fair geographical distribution. In addition, an outgoing non-permanent member may not immediately be re-elected[59].
The composition of the Security Council reflected the geopolitical post-war situation but it seems quite clear that the international dynamics of today make a structural change of the SC a priority on the agenda of the international community.
This need for reform for what concerns the composition of the Security Council is also made urgent by the new challenges that have arisen at the global level and by the presence on the international scene of new centres of power that are asking to be represented there.
There is broad agreement among UN member States on the need to reform the SC, but views differ on the scope of enlargement, the powers to be conferred on new members and the changes to be made to the way the Council operates.
A large group of countries believe that reform is essential to ensure the legitimacy of the body, enlargement to include new members is the only way to strengthen its authority, limiting the use of vetoes is a useful tool to make it more effective, and that it is essential to ensure the legitimacy of the Council itself. Finally, a review of working methods is the only way to increase transparency.
In addition, for some States, which aspire to become permanent members of the SC, the reform will represent a unique opportunity to strengthen its international status.

[59] UN Charter, 1945, Art. 23.

2.2.1.2 Functions and Powers of the Security Council

Chapter V, from article 23 to article 26, describes how the Security Council may exercise its obligation under the Charter for the promotion, the establishment and maintenance of international peace and security.
Specifically, article 24 gives "primary"[60] responsibility to protect to the Security Council in terms of threats to peace. It is quite clear that the specification through the use of the term "primary" implies that the Security Council does not have exclusive competence in this regard but still maintain the main role in terms of control, search for solutions and prompt decision-making effectiveness for possible threats to international security. We can affirm that an international organization's statute establishes the organs of such organization with a balance of powers that has been agreed upon by the founding States, specifying generally, an executive, a legislative and a judicial power that in the case of the United Nations are respectively attributed to the Security Council, the General Assembly and the International Court of Justice, even if it must be recalled that nothing in the Charter expressly characterises the Security Council as an executive body.
Despite the fact that over the decades there has been some controversy over the actual division of competences between the Security Council and the General Assembly, it seems possible to state here that, in the light of an objective view of the Charter, not only does the Council have primary responsibility but also, when it comes to acts falling under Chapter VII, the General Assembly has no competence whatsoever but that it is completely in the hands of the Council.
Furthermore, it seems clear that the rules on the functions of the General Assembly set out in Articles 10, 11 and 14 refer exclusively to cooperation between States parties to a dispute and to the reconciling role of the Assembly itself and that therefore there is no legal basis for any act of the latter which are of a sanctioning nature. It is not necessary for the purposes of this work to go much more in detail in the relationship between the SC and the GA, it is helpful instead, to do an analysis of the work of the Security Council with respect to the ICC related to the powers conferred to the Council under the UN Charter and the Rome Statute.

[60] UN Charter, 1945, Art. 24(1).

2.2.1.3 Voting (art.27)

The abandonment of the doctrine of the *jus ad bellum*[61], which has allowed to move away from the traditional policy of power towards a system based on international cooperation for the defence of human rights, has initiated a change of values and consequently of morality. However, due to the still constant pressure of the so-called *realpolitik,* this process has been not only very contradictory but still discussed today. A clear example of this is the idealistic sponsorship by the main promoting States at the San Francisco Conference, which spread the idea of creating a new world order based on freedom and equal rights for men and women of all nations[62]. However, with the formulation of Art. 27 of the UN Charter, those same governments violated the principle of equality by establishing a right of veto for the permanent members of the Security Council not only to protect their national interests but enabling those same States to arbitrarily influence and guide the international dynamics towards the path they chose just showing the futility of such honourable values which have never truly been respected. The idea that has been circulated in this regard argues that it was necessary to strengthen the victors of the Second World War, so as to avoid any possible unilateral action that could, again, after years of war, call into question international peace and security. Notwithstanding, it is necessary to recall that the role of the Security Council has been very important because maintained the great powers in constant balance avoiding escalations of events that without an international forum as the Security Council could have escalated in chaos again. However, the Security Council's inability to function as a true democratic body because of what is called the Yalta formula highlights regulatory shortcomings within the Council itself that must necessarily be overcome today. Maintaining the status quo of 1945 was one of the main reasons why the great victorious powers of the Second World War brought this geopolitical situation back into the map of the United Nations.

With the end of the Cold War first and the subsequent constant change of balance at the international level, the need to update the map of the United Nations and therefore the structure and procedure of the Security Council emerged. Sponsor governments also guaranteed their permanent right to vote in the Security Council through the arts. 108 and 110, making for the acceptance of the Charter and any subsequent amendments their concomitant ratification a necessary clause as permanent members of the Security Council[63].

In light of this, therefore, it is even more evident that a mechanism has been established that does not allow the United Nations to adapt to the increasingly multipolar international order, but that still sees the permanent members at an incredible advantage over other new emerging powers.

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[61] KÖCHLER (1991:2).
[62] UN Charter, 1945, Preamble.
[63] UN Charter, 1945, Art. 108, Art.110.

According to Article 27 of the Charter:

> 1. "Each member of the Security Council shall have one vote.
> 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
> 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting"[64].

All procedural matters require nine out of the 15 possible votes of the Council, all the other issues' decisions are taken by nine votes out of the 15 but including the concurrent votes of all the permanent members[65]. The Veto power of the P5 represents the most undemocratic principle of the UN Charter and the biggest limit of the United Nations as a symbol of democracy and equality among its member States. Not only the Veto power does not respect the principles enshrined in the Charter and the purposes of the organization itself but it also demonstrates that power's politics still gain against equality, human rights protection, democracy and fulfilment of collective international security. Moreover, the norm stated in paragraph 3, according to which any party involved in a dispute must abstain from voting on decisions falling under Chapter VI of the Charter and under article 52[66], has been in the past decades a very useless regulation for one main reason: the permanent members can decide whether an issue is a merely situation or whether it can be defined as a dispute depending on the possible consequences in terms of threats to the peace[67]. It has though a double-veto effect because they can decide when a certain matter can be eventually vetoed just previously establishing its normative nature.

There is another case in which we can talk about double-veto effect which is related to the procedural and non-procedural matters. According to article 27 the veto power of the P5 can only be enforced when dealing with substantive matters (non-procedural), the point here is that it is up to the members of the Council to establish whether or not an issue is to be considered procedural given the absence of specification in the Charter.

The permanent members also supported in the statement before the San Francisco Conference the idea that the problem should be solved through the most burdensome majority voting and therefore with the possibility to exercise the veto, they also remembered that according to them the Charter was very precise in the distinction between procedure (Articles 28 to 32) and substance (Chapters VI and VII). Actually, it seems more correct to say that the Charter remains fairly vague on this point. This has been demonstrated

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[64] UN Charter, 1945, Art. 27.
[65] *Ibidem.*
[66] UN Charter, 1945, Art. 27(3).
[67] Statement by the Delegations of the Four Sponsoring Governments of 7 June 7 1945, *on the Voting Procedure in the Security Council*.

over the past decades when the Council has acted differently on this same issue.

Finally, we can argue that as the practice has proven to be changeable over the years, when a Council's member State is opposed to specifying a problem as procedural or not, the case remains open in the sense that the same State will accuse the act as illegitimate, referring to a violation of the Charter. The consequences of this situation will depend on the case-by-case analysis, but they remain outside the scope of this chapter. Many regulatory inconsistencies can be extracted from the Charter that shows little adherence to the principles founded on it, from the equality of member States to cooperation between equals. What is also worrying is the little or no questioning of this order, which allows, 30 years after the end of the geopolitical bipolarity of the world, the existence of a hegemony that does not represent the emerging and emerged global forces but also the international dynamics in continuous evolution and change.

2.2.2 Regulatory distinctions between Chapter VI and VII

Before an analysis of chapter VII, which represents the regulatory basis for the Security Council to refer a situation to the International Criminal Court, it seems necessary a previous distinction with Chapter VI, devoted to the peaceful resolution of disputes. Apart from certain provisions (Articles 34 and 35) which regulate general aspects concerning the activity of the Council which are therefore to be systematically linked not only to the other provisions of the same Chapter but also to those of Chapter VII, it regulates the exercise by the Council of a function of a purely conciliatory nature.
The distinction between chapters VI and VII has a practical value to be clarified; initially as regards the domestic jurisdiction. Its conciliation function under Chapter VI is therefore subject to the exception of domestic jurisdiction in Article 2(7) of the Charter.
On the other hand, this same exception cannot be raised when the Council acts under Chapter VII of the Charter. Secondly, another important difference lies in Article 27(3) already mentioned. The distinction is based on the obligation for any member of the Security Council to abstain when the decision falls under Chapter VI. The same obligation does not apply to deliberations under Chapter VII. Having said that, the main distinguishing features between Chapter VI and VII for the exercise of the functions of the Council are mainly 3: first of all, the aforementioned conciliation function, which deals only with matters potentially capable of disturbing peace, the continuation of which therefore endangers international peace and security[68]. Chapter VII, on the other hand, deals with international crises already underway, more precisely acts aimed at threatening peace or, ultimately, acts of aggression[69].
Secondly, the real protagonists, in a certain sense, of Chapter VI are the same ones who are part of the dispute in question. The role of the Council in this case is precisely that of conciliator so that potentially prejudicial situations may be resolved. In this context, it is evident how the States in question and their willingness to put an end to the controversies, and for the consequent rapid solution to the potential crisis, are the main actors.
The third difference, mostly normative, concerns the different means available within the Council according to one chapter or the other. For Chapter VI, the main measure on the disposal of the Council is the recommendation[70], which has no binding force.
As far as Chapter VII is concerned, besides the possibility of making recommendations, the main power of the Council lies in issuing decisions of an operational nature for actions to be taken by itself or by the members of the United Nations. In this case, the decisions of the Council have binding effect.

[68] UN Charter, 1945, Art. 33, Art. 37
[69] UN Charter, 1945, Art. 39.
[70] UN Charter, 1945, Art. 36, Art. 37.

The sanctioning power of the Council under chapter VII in this instance is not considered to be part of the distinctions with chapter VI because it is a characteristic element of Chapter VII only.
More generally, the differences mentioned are not always perfectly attributable to one chapter rather than another, given the impossibility of drawing a clear line of distinction in the abstract and bearing in mind, for example, that chapter VII also alludes to a conciliation function on the part of the Council.

2.2.3 Chapter VII: Actions with Respect to the Threats of Peace, Breaches of Peace and Acts of Aggression

Chapter VII of the UN Charter represents the core function of the Security Council. It provides the framework within which the Security Council may take enforcement actions. It allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression […]"[71] and to make recommendations or to resort to non-military and military actions to "maintain or restore international peace and security"[72].

Since the 1990s, more precisely since the Gulf War, the system of collective security (*i.e.* the set of powers given by Chapter VII to the Security Council) that seemed failed and utopian (we can consider it as unsuccessful until the fall of the Berlin wall and the vetoes the United States and the Soviet Union crossed each other until that period) has had a change of direction and a consequent improvement in perspective, gradually approaching the original idea wanted by the founders of the Charter. One of the main implementing elements of the Security Council when acting under Chapter VII is the intervention in the internal affairs of States, generally when it comes to human rights' violations, civil wars or serious violations.

A second element is the controversial question of whether the measures adopted by the Council have a legal basis in Chapter VII. In this practice, it is necessary to determine whether those actions can be attributed to a rule of Chapter VII, albeit by extending the interpretation, or whether they constitute a customary rule in the Council, justifiable from a purely political point of view and generally accepted. Leaving Article 39 to a subsequent analysis, we now focus on the other articles that express the power of the Council under this Chapter. Article 40 provides for provisional measures that are typical of Chapter VII and are generally cessation of hostilities, ceasefire or withdrawal of troops. Chronologically speaking, although these measures, by their very nature, are to be regarded as predating the measures provided for in Articles 41 and 42, they are not mandatory steps for the Council and represent exhortations to one or more States but are not binding; in any case, it should be remembered that the Council has tried to give a binding character to them that would not legally exist under the Charter. Nevertheless, it must also be stressed that the reference to sanctions in the last part of the article suggests a value which, if not binding, should at least be seriously analysed by the State in question. The measures that can be taken by the Council under Article 41 are coercive and falling within the definition of Article 2(7) which means that are not subject to any jurisdictional limit. The actions taken under Article 41, when implemented in cumulative form, clearly result in the isolation of the State against which the Council is acting and are binding on all the Member States of the United Nations: more precisely, these are actions decided by the

[71] UN Charter, 1945, Art. 39.
[72] *Ibidem.*

Council but implemented by the Member States. The difference between these measures and those of Article 42 is that there is no military use of any kind.
The Council may also adopt actions which are not specified in Article 41 provided that they fall under the domain of those actions which do not involve the use of armed forces. When implementing the measures adopted, the Security Council shall also establish a Monitoring Committee to ensure that there are no unnecessary repercussions for populations in the State in question or in other countries. In this respect, a not inconsiderable problem arises: when there are so-called collateral violations of human rights as a result of the implementation of actions that are not inclusive of the use of armed forces, how does the international community react? How legitimate is the Council to adopt these measures that are based on its own discretional power and that cause collateral damage to third parties? And again: to what extent can the Council deviate from the rules of international law in the implementation of these measures? The answer that many scholars support reflects the fundamental need of all these measures to be respectful of all the rules that are part of the *jus cogens* to which the Council must in some way submit because they are considered inviolable rules.
The mandatory nature of these rules has been apparent since 1969, more precisely in Article 53 of the Vienna Convention; on the assumption that the decisions of the Council reflect the Charter, this would mean that all those actions of the Council which do not respect the rules of *jus cogens* and which are considered illegitimate would reflect the illegitimacy of the rules of the Charter on which these actions are based. Despite the fact that in this case, the Convention speaks of the illegality of the entire treaty, the effect of this could somehow be reduced only on those rules. But the problem that arises is this: what are the mandatory rules of *jus cogens* that must be complied with? The only solution seems to be to define a group of basic rules regarding the protection of human rights and, more generally, of international humanitarian law, but even if we draw this initial group of cogent norms, it is clear how difficult it is to distinguish which actions may violate *jus cogens* and which not. Therefore, the specification remains at least unfinished and the discussion open.

2.2.3.1 Art.39

The assumption that there is a threat to international peace is the basis of Chapter VII and consequently of Article 39 and its determination sees the total discretion of the Security Council as its highest expression. This discretion was also the subject of extensive debate during the San Francisco Conference, during which various parties called for a greater definition of the cases in which one can speak of a threat to peace or acts of aggression (requests made mostly by medium or small States that were afraid of being targeted by the Council, the great powers could of course count on their right of veto); in any case, the final decision at the Conference was to leave huge discretional power to the Council in order to avoid delaying the proceedings.
Doctrinally speaking, in favour of the discretionary power of the Security Council it was argued that, in the absence of the specification of the three terms referred to in Article 39 (*i.e.* threat to peace, breach of peace and act of aggression)[73], their assessment would require factual and political, and therefore non-legal, analysis. The contrary thesis supported instead the theory according to which, being precisely named three situations, instead of giving free rein to the Council, the will to give a limit to the discretion of the Council itself was to be emphasized, which if it were unlimited would make the Council a free authority to intervene in any kind of situation, even if not important from the point of view of international humanitarian law, causing a zero regulatory difference between Chapter VI and Chapter VII.
It is necessary to understand what article 39 means with the term "peace", the threat to or breach of which triggers the applicability of Chapter VII.
In the strict sense, peace is understood as the absence of inter-State or internal conflicts. Recently, however, a new concept of peace has taken hold, which means the combination of economic and socio-political circumstances that prevent the creation of conflicts.
Article 39, by "threat to peace"[74] and "breach of peace"[75], generally intends to encourage the intervention of the Council as a reaction to one or more conflicts that have already occurred or are about to occur rather than as a prevention of future conflicts through the promotion of conditions aimed at avoiding them.
By "act of aggression"[76], the definition of which was avoided during the San Francisco Conference, it refers instead to the most serious situation of those listed and which has rarely been used by the Council.
In any case, the Council may have greater discretion when it comes to the threat to peace, because unlike the other two cases does not necessarily include military operations or the use of violence, thus making it more flexible to the interpretations of the Council.

[73] UN Charter, 1945, Art. 39.
[74] *Ibidem.*
[75] *Ibidem.*
[76] *Ibidem.*

As far as violence is concerned, the only limit found in the Charter is implicitly defined in Article 51, which deals with the principle of legitimate defence, according to which the Council may not consider as a threat to peace, a breach of peace or an act of aggression cases of legitimate individual or collective self-defence[77].

We cannot include in this last speech the legitimate preventive self-defence which is in no way provided for by the Charter and which would therefore be considered as a violation of it.

In conclusion, it can probably be said that the discretionary power of the Council in its assessments concerning Article 39 can be considered legitimate and legitimised by all the member States in whose name the Council exercises its functions.

[77]UN Charter, 1945, Art. 51.

3 The relationship between the ICC and the UNSC:

3.1 The Responsibility to Protect and UNSC Referrals to the ICC

As mentioned above, one of the mechanisms for initiating an investigation by the International Criminal Court is the referral by the Security Council acting under Chapter VII of the Charter, enabled by Article 13(b) of the Rome Statute.
Situations of this kind have been throughout the life of the ICC only two: the situation in Darfur (West Sudan) and Libya.
Both will be analysed individually to highlight the importance of the Council's referral to the Court but also looking for the weaknesses of this procedure, which has led to many disputes within the international community; this is the reason why it will be also analysed the Syrian failed referral that shows once more the primacy of power's politics over criminal accountability.
In this chapter we will try to understand why the international community has developed a line of thought that affirms the willingness of the Security Council to target African countries in a certain way through the International Criminal Court's investigations, which then becomes an instrument in the hands of the great western powers to affirm once again their cultural supremacy.
In this sense, there are some elements that suggest that the permanent members of the Security Council have at least had a double-sided view, which will be highlighted. On the other hand, the explanation for the role of the Court and its importance in holding international accountability for serious crimes is based on the simple concept that we need to look at reality for what it is and intervene where there actually are violations of human rights that the international community refuses to leave unpunished.
If humanitarianism is today the centre of the debate in most of international forums it is thanks to the Responsibility to Protect "R2P", a doctrine developed mainly and more effectively since the 90s, which has had the ability, despite the general scepticism, to create a new international environment that provides for and unequivocally affirms the responsibility of all States to protect, not the right to intervene in the internal affairs of a State but a duty instead, precisely to protect all populations at risk of possible serious violations as we witnessed and failed in Rwanda, Bosnia and Kosovo just to name a few examples. Many criticisms have seen this universal concern for human life as threatening national self-interests, a misconception I believe that can be solved explaining what the Responsibility to Protect really is as embraced unanimously by the General Assembly's World Summit in 2005. Basically we can define three dimensions of it, firstly the responsibility of every State to ensure that its own people don't experience such atrocity crimes either at the hands of the State itself or at the hands of groups within society while the State is impotent or unwilling to deal with them; secondly is the

responsibility of every State, both at a preventive as well as at a reactive stage, to assist other States that might be wanting to protect their own people but just do not have the resources or the capacity to do so; and thirdly there is the responsibility to engage, when prevention has failed or when atrocities are occurring or imminently feared and when the State in question is clearly incapable or unwilling of addressing the problem itself, this wider responsibility of the international community to engage must prevail and not necessarily just through military intervention, which is a very extreme response, but through diplomatic pressure and persuasion, and through non-military corrosive measures as sanctions and in this instance the threat of prosecution before the International Criminal Court. So, the Responsibility to Protect is a multidimensional concept which deals with all stages of a situation from prevention to reaction to post-crises rebuilding and comprehends those different levels of responsibility before mentioned and, above all, it is for its very nature that it recognizes the constraints as much as the opportunities for intervention and it cannot in any way be seen as a tool for the most influential countries to influence the internal affairs of a State but must be considered a necessary framework of tools aimed at avoiding horrible suffering and death to people. As we will see, the problem arises when the Responsibility to Protect is overwhelmed by the interests that characterize modern geopolitics and that consequently jeopardize the criminal accountability and the protection of human rights demonstrating how after all, as recalled by Noam Chomsky during a conference at Clark University (USA) on the 12th of April 2011 "[…] the world does not work as written on books and manuals, but through games of force and power".

3.1.1 The Sudanese Referral

Resolution 1593[78] by which the Council refers the situation in Darfur to the International Criminal Court is the last step in a troubled succession of recommendations by the Council to the Sudan government and the African Union.

Since the beginning of 2003, an internal armed conflict has broken out in Sudan, with, on the one hand, the rebel forces of the Sudan Liberation Army ("SLA") and the Justice and Equality Movement ("JEM") and, on the other, the government military forces that see themselves attacked and no longer enjoy the legitimacy they previously had, even if never in majority form.

Those rebel groups were claiming a neglecting attitude of the government towards the Darfur citizens. After an attack to the military forces in the north of the region during April 2003, the government responded hiring an Arab militia called "Janjaweed" that started a campaign of attacks that included air bombing and imposing a displacement to civilians and even killings of possible rebels, but frequently random or surely disproportionate[79].

The Security Council reacted to this by means of Resolution 1556, in which it called for an immediate halt to the conflict, at least on the government's part, through the dissolution of the Arab militia and its subsequent disarmament, as well as the punishment of the militia's leaders by national judicial authorities[80].

Sudan's response was non-existent, causing a worsening of the conflict as well as greater internal instability. Given the futility of the Resolution, the Council established the International Commission of Inquiry on Darfur[81].

The results obtained by the Commission directly linked the Sudanese government with the Janjaweed militia, and highlighted serious violations of international law and human rights; the Commission "strongly recommended"[82] the Council to refer the situation to the International Criminal Court, because there were clear signs of crimes against humanity.

Following the recommendation of the Commission, the Security Council referred the situation in Darfur to the Court in 2005[83].

The first investigation completed by the Court's Prosecutor and handed over to the Pre-Trial Chamber led to the issue of the first two arrest warrants on 27 April 2007, against Interior Minister Ahmed Mohamed Haroun and militia leader Ali Mohamed Abdel Rahman.

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[78] Resolution of the UN Security Council of 31 March 2005, S/RES/1593.

[79] Report on Darfur to the Secretary General of the International Commission of Inquiry on Darfur of 25 January 2005, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*.

[80] Resolution of the UN Security Council of 30 July 2004, S/RES/1556.

[81] Resolution of the UN Security Council of 18 September 2004, S/RES/1564.

[82] Report on Darfur to the Secretary General of the International Commission of Inquiry on Darfur of 25 January 2005, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*.

[83] Resolution of the UN Security Council of 31 March 2005, S/RES/1593.

The Pre-Trial Chamber's issuance of the arrest warrants was based on article 58 of the Rome Statute which in paragraph 1 states:

> 1. "At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
>
> (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
>
> (b) The arrest of the person appears necessary:
>
> (i) To ensure the person's appearance at trial;
>
> (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
>
> (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances"[84].

At this point, Sudan kept refusing any kind of cooperation's effort with the International Criminal Court which was accused of lacking jurisdiction in Sudan. Sudan has never ratified the Rome Statute and in a certain way the government was trying to cover everything up just recalling the principle of sovereignty of its country and its self-determination's right due to its status of non-party member to the ICC.
The response of the Chamber to the aforementioned claims of the Sudanese government was clear and legitimated by the Rome Statute recalling the extension of the Court's jurisdiction by referral of the United Nations Security Council:

> "Regarding the territorial and personal parameters, the Chamber noted that Sudan is not a state party to the Statute. However, article 12(2) does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the Charter, pursuant to article 13(b) of the Statute. Thus, the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not party to the Statute"[85].

The Court did not stop there. The following year the Prosecutor issued an arrest warrant for the President of Sudan Omar Al-Bashir who was indicted a year later for crimes against humanity and war crimes[86]. He has been removed from power in April 2019, after almost 30 years in charge, the ousted President

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[84] Rome Statute, 2002, Art. 58(1).
[85] Decision on the Prosecution's Application under Article 58(7) of the Statute (2) of the Pre-Trial Chamber I of 27 April 2007, *Prosecutor* v. *Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali-Abd-Al-Rahman ("Aly Kushayb")*, ICC-02/05-01/07.
[86] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir of the Pre-Trial Chamber I of 4 March 2009, *Prosecutor* v. *Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, ICC-02/05-01/09.

of Sudan was found guilty for corruption in December 2019 and will be serving two years of detention in a state-run facility in Sudan.
Sudan challenged again the jurisdiction of the Court still claiming its lack of obligation with respect to the Court's decision and requests due to the non-member status to the ICC.
Once again the Court established the duty of Sudan to cooperate with the Court because the situation was referred to it by the Security Council acting under Chapter VII of the UN Carter enabling the Court to expand its jurisdiction over non-member States and its citizens.
Besides, the Court recalled article 24 and 25 of the UN Charter: firstly, because article 24 in paragraph 1 states:

> "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf"[87].

And secondly because in article 25 member States agree "to accept and carry out the decisions of the Security Council in accordance with the present Charter"[88].
If not sufficiently, the Court also referred to Article 103 of the Charter according to which obligations under the Charter take precedence over any other type of international obligation a Member State has entered into[89].
So, what made Sudan fully obligated to cooperate with the International Criminal Court is basically its status of member of the United Nations, thus even if it has not ratified the Rome Statute its obligations under the UN Charter obliged it to collaborate with the International Criminal Court and to agree to its requests.

[87] UN Charter, 1945, Art.24.
[88] UN Charter, 1945, Art. 25.
[89] UN Charter, 1945, Art.103.

3.1.1.1 The African challenge: Al-Bashir arrest warrant and the Deferral request

The relationship between Sudanese President Al Bashir and the International Criminal Court was a fundamental element which distinguished, in a more general sense, first and foremost the Court's relationship with the African Union in which the Court itself has overwhelmingly investigated the major number of cases; and also the relationship between peace and justice, more specifically the importance of having peace through justice.
Previously, this pair was, and is still considered by many today, not only controversial but also fundamentally senseless or at least difficult to support because accordingly the achievement of justice, criminal or not, does not match with the process of peaceful transition of many countries.
In this work it is supported the idea that it is exactly the opposite situation that is probably the most suitable, namely, there cannot be a peaceful post-conflict transition without making responsible all those who have been stained with violence of the most other gravity; and it is precisely an integral process of transitional justice that allows the effective and stable achievement of a peaceful post-conflict society; and morally speaking, it seems implied to consider necessary a proper process of criminal justice that allows the prosecution of these crimes both in respect and in honour of the victims and their families and because it is the reason why the International Criminal Court has been established in the first place and which includes more than two thirds of the countries of the world.
For what concerns the doubts of the possible immunity of President Al-Bashir as Head of State they were removed, in the first instance, by the Court by citing Article 27 of the Rome Statute which states:

> 1. "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person"[90].

The issuance of the arrest warrants for the Sudanese President has triggered huge protests, especially from the African Union, which has strongly fought for the deferral by the Security Council under article 16 of the Rome Statute.
Sudan kept fighting the legitimacy of the Court, which as enshrined in article 87 of the Rome Statute, threatened the Sudanese government that the

[90] Rome Statute, 2002, Art. 27.

persistence of such attitude towards the Court would have made mandatory a referral back to the Council of such hostility:

> "Where a State Party fails to comply with a request to cooperate by the Court contrary to the 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"[91].

No threat of referral of the hostile attitude towards the Council made Sudan somewhere near to cooperate with the Court, nor the neighbouring countries neither the broader African Union simply because no threats of sanctions have been advanced by the Council due to the political interests the permanent members had in Sudan; for instance, China, as well as Russia, was the first supplier of armed equipment to Sudan, which was carrying out very serious violence on its citizens precisely through the weapons provided to it by some of the permanent members of the Council, the body that should be in the front line for the defence of those same people that were suffering horrible attacks. China also incredibly needed Sudanese oil support. But even more so, it was precisely this lack of any kind of repercussion that pushed Sudan to maintain that hostile behaviour towards the Court and the Council itself that marked the inefficiency of the ICC in being able to carry out its functions, seeing its attempts to carry out its arrest warrants shattered.

We may also mention that what might help the attitude of non-cooperation with the Court was the language used by the Security Council in its resolution 1593 in which just "urged"[92] other States to cooperate and help in fulfilling the Court's requests; clearly it was not an explicit obligation to fully cooperate but just a strong recommendation.

During the thirteenth ordinary session of the Assembly of the African Union ("AU"), one of the main arguments was the International Criminal Court and the arrest warrant for Al Bashir; the Assembly, taking into account that its request of deferral by the Council under article 16 of the Rome Statute was never acted upon, decided that no cooperation would have been showed to the Court by the AU member States pursuant to article 98 of the Rome Statute[93]. From that moment Al Bashir started to visit many countries in the African continent without being arrested or surrendered; what more, some of them were part of the ICC: specifically, a year later, Chad and Kenya were visited by President Al-Bashir respectively on the 21st July 2010 and on the 27th August 2010.

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[91] Rome Statute, 2002, Art. 87(7).

[92] Resolution of the UN Security Council of 31 March 2005, S/RES/1593.

[93] Decision of the Assembly of States Parties of the African Union of 3 July 2009, Assembly/AU/Dec. 243-267 (XII) Rev. 1, Assembly/AU/Decl.1-5(XIII), 9, (hereinafter "Assembly of the African Union, 13th Sess.").

The response of the Court to the African Union was the issuance of a second arrest warrant[94] on the 12th July 2010 exactly before Al-Bashir travelled to Chad; the lack of cooperation from the Africans obliged the Court to refer both members of the Court to the Chamber which after having reinforced the duty to surrender Al-Bashir, reported the situation to the Council and to the Assembly of States Parties to take any action they considered necessary[95].
The African Union reacted vehemently. Firstly, declaring that the primacy of the obligations deriving from the Constitutive Act of the African Union and article 98 of the Rome Statute for Chad and Kenya might not be violated by those countries due to a coercive pressure of the Court to them, as was decided in the 30th Ordinary Session; and secondly, reiterated its delusion with the ignoring-attitude of the Security Council not to seriously take into consideration its request of deferral under article 16, so that there was no moral obligation for African countries to cooperate with the Court and to accept Security Council resolutions on that matter[96]. Despite the unsuccessful Court's requests, from that moment on, some country reaffirmed its will to cooperate in the arrest and surrender of the Sudanese President, for instance Kenya[97].
At the same time others, members of the ICC, persevered in their obstructing attitude towards the Court when in 2011 Al-Bashir visited Chad for the second time, Djibouti and Malawi without being arrested and then surrendered as claimed by the Court.
According to the Malawi's response to the Chamber in relation to the failure to comply with the arrest warrants of President Al-Bashir the main arguments of the African country were based on the incompatibility between the norms enshrined in the Rome Statute and its own national norms regarding immunities, and the international obligations of Malawi with respect to international law and to the African Union that support immunities for Heads of State in their official capacity; Malawi also argued that article 27 of the

[94] Decision on the Prosecution's Application for a Second Warrant of Arrest against Omar Hassan Ahmad Al Bashir of the Pre-Trial Chamber I of 12 July 2010, *Prosecutor* v. *Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, ICC-02/05-01/09.
[95] Decision of the Pre-Trial Chamber I of 27 August 2010, *Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute About Omar AI-Bashir's Presence in the Territory of the Republic of Kenya, Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-107, (hereinafter "Decision on al-Bashir's Visit to Kenya"); Decision of the Pre-Trial Chamber I of 27 August 2010, *Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar AI-Bashir's Recent Visit to the Republic of Chad, Prosecutor* v. *Omar Hassan Ahmad Al Bashir* Case No. ICC-02/05-01/09-109, (hereinafter "Decision on al-Bashir's Visit to Chad").
[96] Press Release of the African Union of the 29 August 2010, *on the Decision of the Pre-Trial Chamber of the ICC Informing the U.N. Security Council and the Assembly of the State Parties to the Rome Statute About the Presence of President Omar Hassan AI-Bashir of the Sudan in the Territories of the Republic of Chad and the Republic of Kenya* (hereinafter "Press Release, African Union, Decision of the Pre-Trial Chamber").
[97] Transmission of the reply from the Republic of Kenya of the Pre-Trial Chamber I of the 29 October 2010, *Prosecutor* v. *Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-119.

Rome Statute is to be interpreted *inter alia* and did not apply to Sudan, non-member State of the ICC[98].

The Chamber responded to Malawi addressing every single element of interpretation. Every claim of Malawi regarding its own national legislation on immunities of Heads of States was rejected *in limine*[99] by the Chamber citing article 27 of the Vienna Convention which states: "A Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"[100]. With regard to immunities for official capacity under international law, lacking a *communis opinio*, the debate is still opened: many scholars believe it is an action *ultra vires* by the Court, when requesting the wave of immunity for official capacity, under customary international law but on the other hand many others find the absence of immunity necessary for the criminal justice process to develop and argue it is justified by the intervention of the Security Council under Chapter VII of the Charter which legitimize the suspension of such immunity by the ICC.

By the way, on this issue, the Chamber still in response to Malawi referred to the most significant jurisprudential precedents since the First World War concerning the annulment of such immunities on the grounds of official capacity, to enable the criminal justice process, as follows: the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties rejected it in March 1919[101]; the International Military Tribunal sitting in Nuremberg rejected it in October 1946[102]; in 1950 the General Assembly adopted "Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal" rejecting it[103]; article 7(2) of the Statute of the International Tribunal for the Former Yugoslavia as well as article 6(2) of the Statute of the International Criminal Tribunal for Rwanda and article 6(2) of the Statute of the Special Court for Sierra Leone exclude such immunities[104]; lastly the International Court of Justice, which cited the ICTY, ICTR and the ICC Statutes, concluded that international customary law provided immunities for official capacity only

[98]Decision Pursuant to Article 87(7) of the Rome Statute of the Pre-Trial Chamber I of 12 December 2011, *on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, *Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-139 ("hereinafter Decision on Failure by Malawi to Comply").

[99] Decision on Failure by Malawi to Comply, ICC-02/05-01/09-139.

[100] Convention on the Law of Treaties, Vienna, 23 May 1969, Art. 27.

[101] Decision on Failure by Malawi to Comply, ICC-02/05-01/09-139.

[102] Proceedings of the International Military Tribunal sitting at Nuremberg of 1 October 1946, *The Trial of German Major War Criminals*, Part 22, at 447; Decision on Failure by Malawi to Comply, ICC-02/05-01/09-139.

[103] Official Records of the General Assembly in its 5th session of 1950, GA/1316 Supp. N°12, par.102; Decision on Failure by Malawi to Comply, ICC-02/05-01/09-139.

[104] Statute of the ICTY 1993, Art. 7(2); Statute of the ICTR 1994, Art. 6(2); Statute of the Special Court for Sierra Leone annex to the Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution of 14 August 2000 SC/RES/1315, signed at Freetown, on 16 January 2002, Art. 6(2). Decision on Failure by Malawi to Comply, ICC-02/05-01/09-139.

under national law[105] but such provision "[…] does not enable it to conclude that any such an exception exists in international customary law in regard to national courts"[106].
Finally, the Chamber concluded that:

> "For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes.
> There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply"[107].

The African Union insisted in rejecting the Court's requests and tried to influence all African Parties to still be reluctant towards the Court and the Security Council.
The threats of the U.S. suspension of funds and aids to any country not complying with its obligations under the Rome Statute in the arrest and surrender of the Sudanese President made a change of path for many of those countries finally possible, still others maintained their position in defending Al-Bashir. We can understand how difficult the enforcement of its decisions for the International Criminal Court can be; as well recalled it is a paradox[108] that the ICC takes its jurisdiction power from the lack of "good intentions" by States that do not want to prosecute individuals accused of heinous crimes but at the same time the ICC needs those States to cooperate with it to see its decisions transformed into real actions.
The referral of the Sudanese situation to the ICC was approved in the Council on 31 March 2015, with 11 votes in favour and 4 abstentions. Among the latter, the abstentions of two permanent members, China and the United States of America, are important. The International Commission of Inquiry previously shared the view that recourse to the ICC could have a deterrent effect on future crimes and that, consequently, the Security Council should consider using the referral instrument not only for reasons of justice, but also for conflict resolution. However, the Commission pointed out that the mandate given to the ICC should not have been selective, but should have allowed the investigation of all crimes committed, both by the government still in office, and by rebel groups, without even indicating any time limit, except, of course, that of 1 July 2002, the date of entry into force of the Rome Statute. However, it should be pointed out that, although it has been acknowledged that both parties to the conflict have committed international

[105] LOMELI (2014:19).
[106] Judgment of the International Court of Justice of the 14 February 2002, *on the Arrest warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*; Decision on Failure by Malawi to Comply, ICC-02/05-01/09-139.
[107] Decision on Failure by Malawi to Comply, par. 43; ICC-02/05-01/09-139.
[108] LOMELI (2014:22).

crimes, the report particularly focused on the seriousness of those perpetrated by government authorities. In the presence of such a situation, however, it was conceivable that the activity of the ICC would be hindered by the Sudanese Government, which, as mentioned, has always refused to cooperate with the Court, even when the investigations or arrest warrants were addressed to members of rebel militias. In the case in question, it was above all the lack of support from the Security Council that limited the effectiveness of the ICC's action, to the point that, in December 2014, the Prosecutor announced the decision "to hibernate the investigations in Darfur because of the Council's lack of commitment to supporting the work of the Office in a situation it had referred to the Office"[109].

The lack of cooperation on the part of local authorities, as the ICC's Prosecutor has repeatedly reiterated, should therefore have been compensated for by a stronger and more effective action on the part of the Council[110], which has essentially remained defenceless towards Sudan and the African Union, without therefore supporting the work of the Court through the instruments offered by the Charter. Returning for a moment to President Al Bashir; the last case, was the trip he made on 13 June 2015 to participate in an African Union summit in South Africa. The latter, as a State party to the Rome Statute, should have executed the ICC's arrest warrant under its obligations of cooperation under the Statute. On the contrary, the South African government allowed Al Bashir to leave, despite the fact that the High Court of Justice of Pretoria, the day after his arrival, had asked the South African authorities not to allow his departure. As in the case of Malawi, South Africa has taken an oath by citing Article 98 of the Rome Statute, which, as we have previously seen, has been dealt with in detail by the Court, declaring it invalid.

However, another element of analysis needs to be added regarding the waiver of the Sudanese President's immunity and the consequent cooperation of the States with the Court: it would seem more correct to state that the States that are not members of the Rome Statute have an obligation of cooperation that, however, derives from the United Nations Charter and the resolution that activated the jurisdiction of the Court (as in the Sudanese case); consequently, it is reasonable to suppose that the degree of cooperation of those States not members of the Court is dictated by the specific provisions (until now never existed) contained in the resolution of the Security Council, which maintains a fundamental discretionary power when acting under Chapter VII of the Charter, and which in this way obliges all members of the United Nations and presumably therefore those States that are not subject to the Rome Statute to cooperate with the Court.

The assumption that the obligation of cooperation derives simply from the generic resolution of the Council can therefore be excluded because "otherwise the (albeit critical) discretionary power that the UN Charter assigns

[109] Statement of the Prosecutor of the International Criminal Court of 12 December 2014 to the UN Security Council, *on the Situation in Darfur*, pursuant to S/RES/1593.

[110] 21st Report of the Prosecutor of the International Criminal Court of 29 June 2015 to the UN Security Council, *on the Situation in Darfur*, pursuant to S/RES/1593.

to the Council in the exercise of its powers under Chapter VII would be nullified"[111]. The main problem, however, seems to be precisely the trigger for the activation of the Court itself: The Council's referral under Chapter VII.
As we shall see within the Council, in order to reach an agreement on the referral of the Sudanese case and subsequently of other cases (or failed attempts), a compromise had to be reached between the parties which leaves room for controversy.
Firstly, incredibly, the Council, when reporting on the situation in Darfur, does not mention Article 13(b) of the Rome Statute, which gives it the power of referral, but rather refers to Article 16, which deals precisely with the power of deferral[112]. This clearly shows how the Council preferred to proceed carefully at that stage, recalling its power to block any investigation of the Court. This argument can also be supported by another element of analysis: the resolution in paragraph 6 declares international immunity for nationals of contributing States, which would then only have responded at national level to possible crimes[113]. This jurisdictional-exempting clause (that was a provision *sine qua non* for the support of the U.S. and China to the referral) shows an ambiguity that is certainly not indifferent, which de-legitimizes the work of the Court to external eyes and makes the relationship with the Council at least controversial for some main reasons: firstly, how can the Court, an independent judiciary, interfere so deeply with the officials of the United Nations peacekeeping missions by having to respect their immunity only for a very specific category? Secondly, according to what moral or even legal ethical criterion the Court should respect the immunity of this category of persons and not of all the others, including members of a State not party to the Rome Statute? Thirdly, because of the second doubt, why should the work of the Court be considered politically driven only to the detriment of U.S. and not of Sudanese nationals, who among other things, would be obliged to consider the Court only as the pure and independent instrument that offers an opportunity for peaceful resolution of internal conflicts?
In addition to all this questions another controversial paragraph was included in the resolution, paragraph 7 states:

> "Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily; "[114]

It is an ambiguous compromise reached in the Council for the resolution to be adopted: this provision contemplates that no funds for the ICC shall be borne

[111] INGRAVALLO (2016 :9).
[112] Resolution of the UN Security Council of 31 March 2005, S/RES/1593.
[113] Resolution of the UN Security Council of 31 March 2005, S/RES/1593.
[114] Resolution of the UN Security Council of 31 March 2005, S/RES/1593.

by the UN, contravening the Rome Statute and the Relationship Agreement between the UN and the ICC. Too many provisions, that legally speaking can be controversial, leave a debate open on how the framework of the ICC may work in order to succeed in making justice and holding the perpetrators of heinous acts.

It is clear enough how the major powers of the Council can make and they actually made decisions that move from the simple peace-making process but included some element that puts at serious risk the legitimacy of the Court in the eyes of the people as well as the work of the United Nations peacekeeping missions themselves.

3.1.2 The Libyan Referral

Despite the fact that Resolution 1970 of 2011 to which the Council refers the serious situation in Libya[115] is unanimously adopted, the Libyan case represents another moment of controversy for the international community, both because, as we shall see, many elements of the resolution of the situation in Darfur are repeated in this one, and because the situation in Libya is emblematic in demonstrating the Council's attempt to politicise the Court by trying to put an end to the Gaddafi's government and to begin a process of democratic transition in Libya.

As pointed out in the report of the International Commission of Inquiry of June 2011[116], from February of the same year several internal breaks caused an escalation of violence against the population that was asking for the introduction of new democratic measures and a substantial change in the Gaddafi government. The government's response, as in the Sudanese case, was disproportionate and provoked an even higher internal division, so much so that the Human Rights Commission spoke of a non-international armed conflict[117], also bearing in mind that many rebel groups controlled different areas of the country.

For the sake of completeness of information, it should be added that only a month later, with the Resolution 1973 of March 2011[118], the conflict reached an international character with the armed intervention of NATO.

In this context, I believe it is appropriate, for the purposes of this work, to make a brief analysis of the relationship between peace and justice and the specific weight that the interests at stake have had in speeding up the intervention of the Court and the timing of its investigations.

While NATO intervention was dictated by the Responsibility to Protect to which the Libyan government itself has been called on several times by the international community, it should also be added that the Court's investigations, in the manner and with the speed with which they were carried out, have had both moral repercussions on the reasons that prompted the Council to refer to the Court and also of a factual nature when assessing the results obtained: as will be described below, only one case remains open to the International Criminal Court from the 3 arrest warrants issued in 2011, which has been significantly limited in terms of the number of people investigated between governmental and non-governmental authorities. Many of the protagonists of the Libyan conflict during the month of February 2011 were still unknown to the international community, thus causing all the media and judicial attention to be focused on the most famous faces and, without a shadow of a doubt, guilty. In any case, the speed of the Court's investigations

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[115] Resolution of the UN Security Council of 26 February 2011, S/RES/1970.

[116] Report of the International Commission of Inquiry of 1 June 2011, *to investigate all alleged violations of international human rights' law in the Libyan Arab Jamahiriya*, A/HRC/17/44. 30.

[117] *Ibidem.*

[118] Resolution of the UN Security Council of 17 March 2011, S/RES/1973.

has probably responded to the need implicitly underlined by the Council to put an end to the Gaddafi's government and to begin the long-awaited process of democratization in Libya.
This is underlined because according to Article 53 of the Rome Statute, in the pre-investigative phase the Prosecutor has a certain level of discretion in deciding[119] whether the initiation of a given investigation is really aimed at a fair judicial process and whether the surrounding conditions are conducive to its development. Therefore, in my opinion, a delay in the beginning of the investigations by the Prosecutor, recalling Article 53 of the Statute, would have favoured the emergence of all the forces at stake in favour of greater individual responsibility and the possibility of a more comprehensive punishment by the Court itself.
In any case, the complementarity between peace and justice, advocated in this work, is not questioned by this reflection, which aims primarily to underline that this pair is indeed complementary but when the decisions of the competent judicial body are taken independently and with the sole purpose of facilitating the judicial process and the subsequent peace-making process.
Going back to the referral of the situation in Libya and the consequent investigation by the Court in 2011, it would only lead to three arrest warrants: for the head of state Mohammed Gaddafi[120], for his son Saif Al-Islam[121] and for another of their relatives, but still the head of intelligence, Abdullah Al Senussi[122].
In the referral of the Libyan situation, adopted on 26 February 2011, the Security Council broadens the range of actions to be taken against the Gaddafi's government including an arms embargo, travel ban and asset freeze for Gaddafi and its allies[123] in the government.
At first glance, therefore, Resolution 1970 seems more comprehensive than 1593 and it probably is, taking into account that the referral to the ICC is just one of the measures taken by the Council in condemning the Libyan government. But a twofold problem arises: first, the speed with which the resolution was adopted has demonstrated the political influence that this decision has had since it came even before the International Commission of Inquiry ended its investigation in Libya to verify and provide the information necessary for an investigation to be opened by the Court.
Even more relevant to understand the influence of power politics on the independence of the judiciary is the clause in the resolution that limits the temporal jurisdiction of the Court to events occurring after 11 February 2011.

[119] Rome Statute, 2002, Art.53.
[120] Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi of the Pre-Trial Chamber I of 27 June 2011, ICC-01/11-13.
[121] Warrant of Arrest for Saif Al-Islam Gaddafi of the Pre-Trial Chamber I of 27 June 2011, ICC-01/11-14.
[122] Warrant of Arrest for Abdullah Al-Senussi of the Pre-Trial Chamber I of 30 June 2011, ICC-01/11-01/11-4.
[123] Resolution of the UN Security Council of 26 February 2011, S/RES/1970.

Now, as we know, the Court has a temporal jurisdiction that includes all violations that occurred in a State after its ratification of the Rome Statute. But what is most surprising is that the Council, which is the body that can, by relying on Chapter VII of the UN Charter, give the broadest range of investigation and work to the Court, limits its temporal jurisdiction just from a specific moment in time on, once again represents the double face that the great western powers have when it comes to justice and political interests. Clearly, their previous collaboration with the Gaddafi's government has forced them to limit the influence of the Court so, for them, as not to fall under the eye of its investigation.
Furthermore, Resolution 1970 fully reproduces paragraphs 6 and 7 of Resolution 1593, which deal respectively with immunity from the Court for all nationals of non-member countries and a ban on financing the Court from United Nations funds.
As suggested by Aloisi we are talking of selective justice in its pure essence:

> "Although welcomed as an opportunity for the ICC to investigate crimes that would have otherwise remained outside its jurisdiction, the UNSC referral has *de facto* helped create the basis for the enforcement of a selective justice-one in which individuals may not be indicted, states may not cooperate, and crimes may not be investigated"[124]

What is also to be taken seriously, is the Council's habit of limiting and exploiting the Court according to the geopolitical interests of the moment, making the Court even weaker and more succulent than a body that decides how and when it is necessary to start the justice process.
As in the Sudanese referral, the engine that drives the judicial machine is irremediably influenced by motivations that leave aside the mere and only criminal justice in cases of violations of the worst kind but that on the other hand include all those political and economic interests that represent the main focus of the *realpolitik* that has always characterized the international context.
As far as the continuation of the Libyan situation is concerned, it must be recalled once again that only one of the three arrest warrants issued in June 2011 by the Pre-Trial Chamber I is still valid, specifically that of Saif Al-Islam Gaddafi, who during the period under review was the *de facto* Prime Minister; he filed an admissibility challenge pursuant to articles 17, 19 and 20 of the Rome Statute several times and the proceedings are still on. In any case, Libya still has the obligation to deliver Mr. Gaddafi to The Hague, in which case it would cancel its judgment *in absentia* causing the reopening of the trial[125]. The Head of State, Muammar Gaddafi, died a few months after the arrest

[124] ALOISI (2013:164).
[125] Seventeenth Report of the Prosecutor of the International Criminal Court of 26 February 2011 to the UN Security Council pursuant to S/RES/1970. (hereinafter "17th Report on the situation on Libya to the SC").

warrant was issued, thus cancelling its validity. As for the Head of Intelligence, Al Senussi, whose case is still pending before the Supreme Court of Libya[126], his case was declared inadmissible by the Appeals Chamber after the appeal made by the Libyan government, as was granted supremacy and precedence to the national courts that had taken charge of pursuing the accusations[127].

To date, three more arrest warrants have been issued for two alleged perpetrators of crimes against humanity, namely: in April 2013 against Al-Tuhamy Mohamed Khaled, made public in 2017 with the hope of receiving cooperation from the international community, two years after the arrest warrant remains unexecuted[128]. The second case relates to Mahmoud Mustafa Busayf Al-Werfalli, the first arrest warrant dates back to August 2017 and due to further crimes committed, a second warrant was issued by the Court in July 2018. Again, 18 months after the first arrest warrant was issued, the accused remains at large[129].

[126] 17th Report on the situation on Libya to the SC.

[127] Judgment of the Appeal Chamber of 24 July 2014, *on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013, Decision on the admissibility of the case against Abdullah Al-Senussi, The Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565.

[128] 17th Report on the situation on Libya to the SC.

[129] *Ibidem.*

3.1.3 The failed Syrian Referral: Chinese and Russian Vetoes

Ever since Syria blew up in mid-2011, atrocities have been perpetrated by the regime against the protesters but then, as already mentioned, it became a full scale civil war in which clearly atrocities crimes have been perpetrated by both sides. The Syrian case has been a test for the R2P doctrine because the international community was defenceless until the chemical weapons issue grew a new trigger for action to which people have been responsive, but until then the Security Council has been paralyzed and people just watched the situation going worse and worse with thousands of casualties among civilians. The Libyan precedent is a clear example in which the treatment of the government with respect to its own citizens ended with a clear, firm, robust and quick international response which was, after all, a military one. If it stayed as a pure and effective civilian protection operation, it would have been the triumph of the R2P's work and we would have seen some very clear strong signal of change for the future which would have had a significant impact in deterring what's happened in Syria. In early 2011, following similar events in the rest of the region, a series of protests started what is now one of the biggest humanitarian crises of the 20th century in Syrian Arab Republic. The response of the government authorities to the rebel's protests was not long in coming and already in March of the same year the violent actions spread to the whole country causing the first reactions from the international community. On 9 May, the Secretary General called for an end to the violence, the deaths and the mass arrests. On 11 May, Syria withdrew its membership from the Human Rights Council.

Already in July 2011, the High Representative for Human Rights requested that the systematic violations taking place in Syria be referred to the International Criminal Court. The attacks multiplied in the following months, and embassies and consulates were also targeted. The risk of civil war was imminent, if not already overcome. The Arab League withdrew Syrian membership in November 2011, at the end of the year were evident the violations and crimes against humanity that Syria was witnessing in front of a substantially defenceless international community.

The year 2012 is characterized by the continuation of rivalries and conflicts in Syria, and by the intervention of the UNSMIS forces that, however, did not achieve any significant result; on July 22 the Arab League asked Assad, Syrian president, to renounce the office for a sure exit from what was clearly evolved into a civil war.

On 14 January 2013, Switzerland forwarded a letter to the Council, co-signed by 56 other members of the United Nations, asking for the Syrian situation to be referred to the International Criminal Court.

The deterioration of the Syrian crisis continues throughout 2013, reports point to millions of internal displaced people, arrested, in need of care and humanitarian assistance as well as victims of attacks and violence of all kinds. Despite the already known use of chemical weapons, in March 2013 both government's authorities and armed rebel groups accused each other of the

indistinct use of chemical weapons in Aleppo as well as in the capital Damascus and other cities throughout the country.
It is clear that the evolution of this crisis could have long been a threat to international peace and security since all neighbouring countries have been under pressure from the huge number of displaced people from Syria, and it is clear that the uncertainty of the Security Council in taking, promptly, some countermeasure under Chapter VII of the Charter has in some way contributed to the continuation of what has been called a humanitarian catastrophe. In June of the same year, the General Assembly adopted resolution 67/262 with 107 votes in favour, 12 votes against and 59 abstentions calling on all the forces involved to proceed with the political transition of the country by introducing the National Coalition for Revolutionary Syria and Opposition Forces[130]. Regional instability was continuing unabated, and only a political solution could solve a crisis of that calibre.
While chemical attacks continued throughout the country's geography, there was no improvement in the protection of civilians at the same time that the UN Commission of Inquiry was producing great material to prove the violations and crimes against humanity that were being perpetrated on Syrian soil.
For the sake of completeness, it is useful to remember that the protests that proved the humanitarian crisis in Syria were initially secular in spirit and focused on achieving a change at the highest level of government in the country, with the spread of those protests and the inclusion of all the factions in the Syrian spectrum there was a clear polarization of the camps that divided, as imaginable, the international community as well, and which more precisely saw the support of the USA, France and the United Kingdom on the one hand and that of China and Russia on the other.
The failure of the Geneva talks in 2014 led subsequently to the French draft resolution[131] sponsored by more than 60 members of the United Nations to report the serious Syrian situation to the International Criminal Court. The resolution was not approved because of the veto put forward by China and Russia, an episode that once again demonstrated the enormous supremacy of power policies and geopolitical interests over the protection of innocent people and the defence of human rights in cases of crimes of the worst kind.
Many other resolutions were subsequently adopted by the Council to address different aspects of the Syrian crisis that continued to leave victims on the ground and perpetrators unpunished, such as Resolution 2235 of August 2015, which established an investigative mechanism to determine accountability for chemical attacks in Syria[132].
The brutality on Syrian territory will be one of the greatest regrets of the twentieth century in which politics, cultural and ethnic differences and geopolitical interests intertwine in a succession of atrocities and deaths

[130] Resolution of the UN General Assembly of 04 June 2013, A/RES/67/262.
[131] Draft Resolution of the UN Security Council of 22 May 2014, S/2014/348.
[132] Resolution of the UN Security Council of 07 August 2015, S/2015/2235.

without distinction in which to pay the consequences is and will always be the man. As stressed by Cockayne and Wenaweser:

> "It is also a war characterized by terrifying brutality and systemic disrespect for the most basic rules of international humanitarian law, ranging from the promotion of enslavement on an industrial scale, to indiscriminate attacks on civilians. Since the United Nations (UN) Human Rights Council established an Independent International Commission of Inquiry on the Syrian Arab Republic (CoI) on 22 August 2011, it has produced more than 20 outputs documenting violations and abuses committed by the Syrian government, anti-government armed groups and terrorist organizations, in particular Islamic State in Iraq and the Levant (ISIL) "[133].

The division within the Council on the Syrian situation saw as its main motivation the difference of interests and priorities by the opposing blocks. While on the one hand the USA, France and the United Kingdom wanted to take advantage of the escalation of the conflict to bring about a regime change by taking a clear position on the matter, on the other hand Russia and China preferred to be more cautious about the situation in Syria, both taking into account their national interests in this regard, let us remember that Russia was for a long time the strongest ally of the Assad government from which the same government bought weapons, Russia has also strategically positioned itself as a mediator where the United States has miserably failed. What remains clear to posterity is that western attempts to hold government authorities and their crimes accountable for the most part, and Russian and Chinese attempts to defend the Assad's government by criticising the United States and France in particular for financing terrorist groups, have in no way helped the reconciliation process in Syria, has not made anyone responsible for the crimes committed, has not allowed any kind of political solution and still leaves open a conflict that lasts several years and that has worn down from the roots a population, a country that probably still for some time will not see prevailing justice and consequently will not see a peaceful and democratic transition in the short term.

[133] COCKAYNE, WENAWESER (2017:212)

3.1.3.1 Draft Resolution 2014/348

The failed French draft resolution co-sponsored by more than 60 countries, as said, is the most obvious representation of the failure of the Security Council system and the ineffectiveness that, in cases of fundamental humanitarian relevance, this has demonstrated; reaffirming once again the need for a change, if not structural at least procedural, in the context of the decisions under Chapter VII of a substantial nature which provide for the possibility of the use of veto by permanent members and which in fact jeopardize one of the key principles of the Charter of the United Nations declined both in the preamble and in Article 1, namely the determination to seek peacekeeping and defend human rights universally recognized[134], underlining the prevalence of geopolitical interests that have always dominated the international spectrum and that possibly characterize anthropologically the need for man to prevail.
Together with the analysis of the resolution itself which reveals how also in this case controversial *sine qua non* clauses have been inserted, it seems interesting to take into consideration the report of the Council on the 7180th meeting of 22 May 2014, which provided exactly for the vote on the draft resolution in question and the various following comments.
Paragraph 7, as in previous resolutions in Syria and Libya, limits the jurisdiction of the Court to all nationals, present on Syrian territory, of a State that is not a member of the Court, who can be held responsible for acts committed only by their national judicial system[135].
The Russian commentary in this regard is sharp:

> " […] The United States frequently indicates the ICC option for others, but is reluctant to accede to the Rome Statute itself. In today's draft resolution, the United States insisted on an exemption for itself and its citizens.
> Great Britain is a party to the ICC, but for some reason is unenthusiastic about the exploration in the Court of crimes committed by British nationals during the Iraq war. If the United States and the United Kingdom were to together refer the Iraqi dossier to the ICC, the world would see that they are truly against impunity […]"[136].

On such statement we must make a clarification: the jurisdiction of the Court and the admissibility of one or more cases are limited by the *ratione temporis* clause which provides for a time limit not to be exceeded by the Court itself as analysed above, obliges the Court not to be able to judge any case that predates the ratification of the Rome Statute. This element does not seem to have been considered by the Russian Federation in its commentary with reference to Great Britain.

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[134] UN Charter, 1945, Preamble; Art. 1.
[135] Draft Resolution of the UN Security Council of 22 May 2014, S/2014/348.
[136] Statement of the Russian Federation in the 7180th Meeting of the Security Council of 22 May 2014, S/PV.7180.

When talking about ICC's intervention we may recall that the admissibility of a case before the Court is triggered by a complementarity principle namely the Court will intervene when a State is unwilling or unable[137] to make perpetrators accountable; in this sense, the Syrian Arab Republic addressed a statement at least to be recalled:

> "The international legal system is based on fundamental pillars, of which the most important is the fact that States have primary and exclusive responsibility for establishing accountability and justice in their territories.
> As a result of the regrettable events in my country, the Syrian Government has taken a series of steps designed to hold accountable the people involved in those events and to take appropriate legal actions against them. Our national investigation committee continues to work alongside the Syrian judiciary, which since the crisis began has investigated 30,000 cases, issued rulings on those involved and settled the conditions for others, confirming the Syrian Government's desire and ability to have justice and negating the possibility of pretexts aimed at involving any international judicial body that might contradict our national judiciary's powers"[138].

It is believed here, that the condition of complementarity is relevant in addressing a situation to the Court firstly because it is how the framework, in which the Court works, was established and also because the freedom of a State which is capable to deal with such crimes represents a feature that the international community's system cannot leave aside, also taking into account the geographical limits of the ICC's jurisdiction, Syria, for instance, is not a member of the Rome Statute.
In any case, in Syria the complementarity principle was clearly verified because the national remedies could not be considered reliable due to the incredibly high level of involvement of the State's machine in the conflict.
The draft resolution recalled another paragraph of the previous resolutions 1593 and 1970, in which the Security Council:

> "Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute"[139].

On this matter, article 115 of the Rome Statute is revealing:

> "The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:
> (a) Assessed contributions made by States Parties;

[137] Rome Statute, 2002, Art. 17(1a).
[138] Statement of the Syrian Arab Republic in the 7180th Meeting of the Security Council of 22 May 2014, S/PV.7180.
[139] Draft Resolution of the UN Security Council of 22 May 2014, S/2014/348.

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council"[140].

According to paragraph b, the Court's expenses may be provided by the funds of the United Nations which are, however, subject to the approval of the General Assembly, which among other things retains precisely the task of financial matters[141] as described in Articles 17, 57 and 63 of the Charter. In this sense, therefore, by inserting this clause in the two referrals adopted, as well as in the draft resolution not adopted, the Council violated the Charter by taking a decision that does not belong to its spectrum of functions and powers under the Charter itself but that clearly belongs to the General Assembly.
Once again, therefore, the Council must act according to a criterion that is no longer that of a legitimate, democratic and, above all, coherent body with its constitution, but as a politically guided body, which gives priority to certain aspects and/or requests that prove to be inconclusive, morally questionable and, in some cases, legally invalid.

[140] Rome Statute, 2002, Art. 115.
[141] UN Charter, 1945, Art. 17, 57, 63.

3.2 The judicial independence of the ICC

The independence of the International Criminal Court is one of the key topics of this study as well as of many international debates. The positions on this issue are varied, but in principle what draws attention to is the work of the Security Council in reporting situations to the Court and leaving out of its intervention other cases that probably deserved at least preliminary investigations.
By that I mean that the discretion of the Security Council in referring some situation to the Court and in vetoing the referral of others represents a big hole in international criminal justice that cannot pass unnoticed. It is in the interest of the international community to give the possibility to the ICC to fulfil its duty through a fair and independent process of investigation with must be based on criminal accountability, leaving aside all the motivations that move the Council, specifically the P5, to choose according to political interests what cases the Court can investigate.
Recalling article 2 of the Relationship Agreement between the ICC and the United Nations which states:

> "The United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with articles 1 and 4 of the Statute, has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes"[142],

if the Court is to fulfil its mandate and purposes according to the Rome Statute, its independence must be ensured internally and externally. Internally by a coherent and exhaustive legal structure that allows all the judicial procedures to be transparently conducted; externally, by ensuring an independent investigation's power to the Court that may be able to judicially take part to any kind of conflict addressing criminal accountability. The point is, in other words, that the ICC needs a universal jurisdiction instead of be limited to and guided by the Security Council which is, as known, a political body. The way in which the universal jurisdiction of the ICC may be structured must not jeopardize the importance such feature possesses in the international criminal justice's world.
The problems the ICC faces are varied and comprehend different aspects of its capacity to act as a judicial body. For example, let us consider the collection of evidence: in this sense, it seems clear, that this task is much more difficult for the officials and judges of the Court with respect to the national ones, taking into account the difficulties they encounter when they go to countries where, as has often happened, a conflict is still ongoing. Moreover, we should not underestimate the difficulties linked to the cultural and linguistic

[142] Relationship Agreement between the International Criminal Court and the United Nations, 04 October 2004, Art. 2(1).

differences that can create many misunderstandings and especially in the case of Middle Eastern countries or Africans who see, for historical reasons of a mainly colonial nature, the western world with distrust and are not very inclined to cooperate.
Another fundamental element, is the lack of a police force and therefore of an enforcement power that can put into practice the decisions of the Court and that creates a clear and probably insurmountable imbalance between what should be done (arrest warrants and surrenders) and what is then really carried out.
For the purposes of a pure criminal judicial process, the Court should have maximum freedom to initiate certain investigations. During the negotiations leading up to the Rome Statute, guarantees had to be provided so that a compromise acceptable to the majority could be reached; in this sense, the Council's referral was seen as the key point of the whole model that the Rome Statute was about to introduce. Nevertheless, in the end what proved to be much more effective was the referral of a member State (what became the self-referral of many African States); the Council's referral instead has seen its effective use only twice, demonstrating that in cases of serious violations the Court is not endowed with sufficient freedom of action, but that in cases outside its jurisdiction, which I believe to be its main weakness, it must refer to the decisions of the Council, a body of an executive nature that is moved on the basis of geopolitical reasons that reduces the value of criminal responsibility and jeopardize the process of justice for which the Court was created. The most spontaneous doubt that arises from this is to think that the inefficiency to which the Court has often had to submit may ultimately lead to its total disuse, in fact it does not have universal jurisdiction despite the acknowledged universality of the crimes it pursues, it does not have an instrument for enforcing its decisions and still maintains several budget problems that do not allow it to fully achieve its objectives.

3.2.1 International Criminal Law and Universal Jurisdiction

A subject that often resonates in the international arena when analysing international criminal justice is universal jurisdiction. There is a premise in this sense since it is a concept that has not yet developed a normative system nor an exact definition shared by the international community. Before going into the details of universal jurisdiction, it is appropriate to dwell for a moment on International Criminal Law and try to briefly define its scope of action.
According to Bassiouni, International Criminal Law can be defined as "the convergence of international aspects of municipal criminal law and criminal aspects of international law"[143]. This definition encompasses together a number of characteristics including, evidently, a form of limitation for national legislation, describing precisely an international parallel characterized by the principle of extra-territoriality. In the second place, what Bassiouni defines as international municipal law expresses its international form through the mutual assistance between States in criminal matters[144], a co-operation which is in fact described in several basic principles of international law[145].
For criminal aspect of international law Bassiouni means all those crimes enshrined in the international law's framework because categorized as violations of internationally recognized values which the community considers essentials: generally, we can find them in international treaties that recognize for basic obligations for individuals and the ensuing individual criminal liability.
For what concerns the universal jurisdiction I refer to the definition given by Bassiouni according to which:

> "The theory of universal jurisdiction is extraneous to the concept of national sovereignty, which is the historical basis for national criminal jurisdiction. Universal jurisdiction transcends national sovereignty"[146]

This definition is clearly a value-based definition which has also been supported by various international organizations, it moves away from any accusation of being oriented by western values as it substantially detaches itself from any socio-cultural characteristic to define precisely a jurisdiction that is legitimized by the commission of crimes universally recognized as among the most serious and avoiding any approach to national-based interests of any kind.

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[143] BASSIOUNI (1980:2).
[144] BANTEKAS (2010:358); BASSIOUNI (1980: 2); KRESS (2012:718).
[145] BASSIOUNI (1980:2).
[146] BASSIOUNI (2001:96).

In any case we may recall that still today there is not a shared definition commonly accepted of universal jurisdiction nor in conventional neither in customary international law[147].
What is commonly shared is the list of crimes that may belong to such jurisdiction, in better words, there is a common opinion on the substantive scope of the universal jurisdiction and we may recall the Expert Report that in 2009 has included in this category the crimes of torture, genocide, crimes against humanity, war crimes and piracy[148].
This study supports the idea that a universal jurisdiction would be of fundamental importance to the International Criminal Court. First of all, as a deterrent for possible future crimes, as a lack of geographical limits would make the work of the Court more legitimate and effective as well as easier in the eyes of possible perpetrators.
Secondly, morally speaking, it seems logical to suppose that an international court whose task is to punish crimes of a universal nature, which are universally recognised as such regardless of the nationality of the victim or of the aggressor or the possible place where the crime takes place, should be equipped with a jurisdiction capable of dealing with the whole spectrum of possible crimes without territorial limitations: once again the definition of Bassiouni[149] seems correct as it may not include any collision between such jurisdiction and national interests.
Thirdly, it is precisely because of the jurisdictional aspects that the Court, 18 years after its entry into the international arena, has encountered the greatest number of problems: it seems clear, therefore, that this is the direction towards which we must work in order to find a compromise that will allow the Court to exercise its work smoothly and avoid any kind of recrimination based on national sovereignty.
Over the years, however, the concept of universal jurisdiction has seen criticism from different directions.
In the case of African countries, the African Union, although it has shown sympathy with this type of hypothetical regulatory context with the Expert Report mentioned above[150] and recognizing its importance through Article 4 of the Constitutive Act of the Union itself[151], which provides in some cases for the transcendence of certain crimes from the simple national level, on the other hand is critical because it attributes to western countries the practice of wanting to use this type of jurisdiction selectively: a selective universal jurisdiction that would run counter to its true essence and would be guided by the search for a western cultural supremacy that has long been reviled and fought against. In this sense, I would like to recall the controversial debate that

[147] Dissenting Opinion of Judge Van den Wyngaert of the ICJ of 14 February 2002, *on the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, para 44.
[148] Report of the Council of the European Union of 16 April 2009, *on the AU-EU Expert Report on the Principle of Universal Jurisdiction*, 8627/1/09 REV 1.
[149] See note 141.
[150] See note 145.
[151] Constitutive Act of the African Union, Lome, 11 July 2000, Art. 4(h).

has characterised the case of President Al-Bashir of Sudan, in which the African Union has repeatedly made clear its opposition to an extension of the jurisdiction of the Court in favour of national courts.
Bearing in mind the complexity of the fields of the International Criminal Law, the scope of this study is not to address all the features that characterize such normative framework briefly described above, instead this work focuses on the aspects that defines international core crimes and the regime in which they are dealt with, with the purpose to find weaknesses in the regulatory structure of the International Criminal Court and in the controversial dynamics that characterise its relationship with the Security Council.
In the context of the regime in which those core crimes are tackled by the international community, to better understand the complexity of the acceptance of the universal jurisdiction for the ICC by the international community we may recall the opinion of the head of the U.S. delegation at the Rome Conference David Scheffer who stated:

> "It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize. No other country, not even our closest military allies, has anywhere near as many troops and military assets deployed globally as does the United States. The theory that an individual U.S. soldier acting on foreign territory should be exposed to ICC jurisdiction if his alleged crime occurs on that territory, even if the United States is not party to the ICC treaty and even if that foreign state is also not a party to the treaty but consents ad hoc to ICC jurisdiction, may appeal to those who believe in the blind application of territorial jurisdiction"[152]

This criticism moves from the assumption that may not be accepted that the ICC has jurisdiction over non-party nationals in cases in which they have committed crimes covered by the Rome Statute on the territory of a State Party as enshrined in article 12 (2) of the Statute. In this sense, if it is true that there is no obligation for the defendant State with respect to a treaty it has not ratified, on the other hand seems rational to believe that considering that a State possesses jurisdiction over its territory and it is able to control and punish violations of conduct committed in it, the ICC may exercise its functions when such State gives it the consent requested and enshrined in article 12 (3). No international law norm is violated in such case, on the contrary it represents an important step towards the universalization of criminal matters.
Furthermore, the principle of complementarity leaves to the State in which the crime is committed the possibility to carry on the judicial process until it demonstrates unwillingness or inability for it.
For the sake of clearness, all the cases of crimes committed by non-party nationals on non-parties territory the only triggering method the Court has, is the Security Council referral.

[152] SCHEFFER (1999:12-22).

The concept of universal jurisdiction, in summary, refers to a fundamental problem that needs to be given strong consideration in the future. First of all, through the diffusion that this concept is having, there is a general acceptance that some crimes are considered extremely serious and are therefore punishable on the whole planet. The doubt arises when, however, it is necessary to regulate the structure of a hypothetical universal jurisdiction. If it were based on a treaty, it is clear that the very limitation of a treaty that extends its obligations to its contracting parties only, *i.e.* the Member States, would result in a lack of universality because those States that were not part of it would not be subject to its obligations. It is therefore necessary to consider other ways for the extension of such a jurisdiction that has historically been a predominantly State concept. Criticisms will probably continue to be raised, and will be moved by the will to emphasize the congruence and equality that must be included as key principles and that have seen with regard to the International Criminal Court, for example, the African area strongly criticizing its legal foundations, recalling a form of legal neo-colonialism on the part of western countries.

The link between those various criticisms of a cultural-historical nature remain the crimes dealt with in this study, which underline the discipline of the ICL and the work of the ICC, which despite being substantially framed only by a number of countries, which have not taken into account the will of many former colonies, have achieved and maintain a universal status that transcends any regional barrier, removing them from any partisan cultural heritage and legitimizing them universally.

Excluding for a moment the possible interests that have moved or are moving the ICC's relationship with the Council, it is important to make a small parenthesis on what seems to be a good basis on which to work in the future in relation to a hypothetical universal jurisdiction.

As has been said, outlining an appropriate regulatory structure for such a jurisdiction, which is effective and recognised by the international community, seems complex, but referring to Article 13 of the Rome Statute, there is a certain type of universal jurisdiction which could be a starting point for future amendments and regulatory improvements to the Statute itself.

The Council's referral under Article 13 does not provide for any kind of nationality or territoriality requirement to be admissible to the Court and therefore subject to its investigation.

It is a form of universal jurisdiction which presents, by the way, clear limits. Firstly, by now recalling the interests which may or may not favour a referral from the Council, the judicial independence of the Court is seen to be influenced by the lack of the main feature of an independent system of criminal justice, a total discretionary power which is well established in the rule of law and national judicial regulatory systems.

Secondly, even if a regulatory model were to be established by extending the jurisdiction of the Court, a not insignificant problem emerges: the lack of a police force to enable the Court to put its decisions into practice, thus greatly reducing their effectiveness.

As long as the Court is subject to the cooperation of the Member States to materialize arrest warrants and other decisions, there will always be an imbalance and paralysis that undermines the very independence of the body. All the more so if we consider that, as has often happened in the last decade, the Member States called upon to cooperate with the Court have always preferred to disobey it because of their national interests. Furthermore, these hostile attitudes towards the Court have had no repercussions whatsoever: the Council charged with achieving and maintaining international peace and security, and with the legal capacity to take decisions in response to this hostility has remained defenceless on several occasions, once again to maintain a political balance that should have nothing to do with the process of international criminal accountability and an independent judicial organ created theoretically to address it.

3.2.2 Positive Complementarity

The International Criminal Court's most important purpose is to end impunity for the most serious crimes internationally recognized as such.
The ICC's normative framework is based, among others, on the principle of complementarity which, as mentioned before, represents a clear shift from the international tribunals of the past that enjoyed primacy over national institutions in addressing punishment for terrible violations perpetrated during grave human rights' crises such as in former Yugoslavia or Rwanda. Through the principle of complementarity then, the international community tried to give a stronger national prosecution capacity that for internationally convicted crimes since Nuremberg were dealt by international tribunals.
The requisite of complementarity for the ICC to intervene is the unwillingness or inability of a State to start a judicial proceeding against those alleged criminals.
By virtue of this prerogative *i.e.* to give the possibility of achieving justice at national level, an alternative that has developed since the inauguration of the Prosecutor Luis Moreno Ocampo, who was the first to introduce its potential, is the positive complementarity.
The idea is to give greater support, in a way, to the judicial capacities of national institutions clearly in cases where they have obvious and prohibitive shortcomings. The positive complementarity can be a policy of the Office of the Prosecutor that

> "would actively encourage investigation and prosecution of international crimes within the Court's jurisdiction by States where there is reason to believe that such States may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offers a resource-effective means of ending impunity"[153].

In this study is supported the idea of improving the possibilities of triggering the ICC's jurisdiction for the only purpose of at least reducing impunity throughout the world, if the positive complementarity that will be now analysed, allows the whole system to earn in terms of efficacy and clearness it may be desired and sought after beyond any reasonable doubt.
The former Prosecutor Moreno Ocampo when taking office and talking of positive complementarity expressed its optimistic understanding of the consequences of a positive complementarity thanks to which the number of cases should not value the efficiency of the Court, on the contrary the absence of trials before the ICC due to the regular functioning of national institutions, would be a major success.

[153] BURKE-WHITE (2008:62).

He was clearly affirming the importance of national institutions before the ICC's intervention, that actually represents the failure of national judicial system's efficiency and independence.
The basic concept of the positive complementarity relies on the support the Office of the Prosecutor would ensure to national institutions to move forward with their own investigations of the crimes within the jurisdiction of the Court. It is clearly opposite to the concept of complementarity as envisioned during the establishment of the Rome Statute in which the Court intervention was seen as an endpoint for national remedies.
The Court, according to the Rome Statute's vision, would step in after national remedies have showed to be inefficient and such failure would trigger the resources of the ICC in terms of independence and rapidity despite the various weaknesses that have been found in the regulatory structure of the Court itself, starting with the jurisdictional problems (which probably represent the real "Achilles' heel"), passing through the economic problems that the Court may face in putting its decisions into practice, as well as in gathering evidence and protecting possible witnesses with all that this entails, to arrive then at the lack of an enforcement power that can oversee all steps.
The legality of the positive complementarity can be traced back in the Rome Statute but first of all can be justified by the lack of any norm that prohibits it. Such policy can substantially have the result to encourage the action of the national authorities when they appear passive in front of an alleged international crime.
Article 17 of the Rome Statute seems to be the fair starting point when looking for the legal justification of the positive complementarity. The admissibility requisites of article 17, in the first instance, confirm the primacy of national authorities to investigate alleged crimes and only when such investigations are proved not to be genuine the ICC can intervene and take lead in the proceeding. So the complementarity principle blocks and limits the Court's powers which can act only when States fail to do so. The requisites of admissibility before the ICC in no way bar the Court to support and motivate inactive national authorities to move with such investigations. If on the one hand there is no legal prohibition for the Court to implement such supporting policy, the other aspect that remains to analyse is a hypothetical authorization of the Rome Statute for the Court to do so.
In the Rome System of Justice, as well described in the preamble to the Rome Statute, States have the primary legal obligation to prosecute international crimes and to provide accountability for them; the institutional structure of the Rome Statute includes different authorities on different levels in the national/international spectrum of possibilities. If States are to provide liability for international crimes and appear to be passive and unwilling to do so, the support of the International Criminal Court through different instruments in order to activate national remedies may be considered within the legal barriers the Rome Statute has established and a possible alternative to the unwillingness of such States and to the consequent complementary intervention of the ICC's institutions. The encouragement of the ICC with

respect to the States to fulfil their obligation to provide accountability for international crimes represents the core reasoning on which the entire Rome System of Justice is founded, including the responsibility to prosecute that States and the ICC share in helping bring about an end to such impunities.
The interacting process among the ICC and national institutions with respectively secondary and primary duty to address international crimes, is enshrined in the Rome Statute through different instruments of communication, dialogue and cooperation; article 15, for instance, allows the Prosecutor to seek information from States[154] while article 18, provides for the Prosecutor to notify the State concerned when he/she is about to open an investigation[155].
On the other hand, article 53 envisions the possibility for a State to take primacy again during an investigation's process of the Office of the Prosecutor (hereafter also "OTP") after having showed unwillingness or inability to start such proceeding for its own[156].
Furthermore, article 54 of the Rome Statute defines the relationship among the Prosecutor and States during the investigation's proceeding allowing to establish such agreement, not inconsistent with the Statute itself, useful for the cooperation among the parts[157].
We can see how deeply interconnected the relation among the OTP and the member States is, leaving the hypothesis of a positive complementarity to the discretion of the OTP and the States that decide to cooperate or manage to overcome such obstacles that prohibited the fulfilment of their primary duty under the Rome Statute. Other forms[158] of judicial cooperation and obligations for the member States are enshrined in the Statute under articles 59, 88, 89 and 93.
In any case, this process would convert the system in a more comprehensive and efficient one both at a domestic and at an international level.
According to the positive complementarity the Court would enjoy a more active role in the sustaining process for national authorities to conduct such investigations in the most efficient and independent way. Going into detail, it may refer to four general cases that would be considered as new triggering instruments for the Court: the first one would materialize when a State was unwilling to prosecute international crimes due to expensive costs it would imply; in such case the ICC might be able to intervene in support of such State to enhance the prosecution simplifying such economic calculations.
A second instance for the positive complementarity to trigger the Court's intervention could be when a State is unable to start an investigation due to a judicial debacle or the unaffordability of witnesses and evidence and the ICC's intervention.

[154] Rome Statute, 2002, Art. 15.
[155] Rome Statute, 2002, Art. 18.
[156] Rome Statute, 2002, Art. 53.
[157] Rome Statute, 2002, Art. 54.
[158] Rome Statute, 2002, Art. 59, 88, 89, 93.

A third one would be a case in which the national authorities show willingness and ability to start an investigation or a prosecution but with just some of the alleged criminals. That scenario would allow the Court to share competence with such State and to share the duty to carry on the proceedings, what Burke-White calls "division of labour"[159].

The result can be of fundamental relevance for the purposes of the ICC and the result can also work as a deterrent effect: a judicial system, with regard to criminal matters, framed both domestically and internationally and deeply complementary would reduce incredibly the number of perpetrators. Moreover, such a context would also prove another dynamic that should not be underestimated: all the criticisms that the Court has received and which were based on the concept of a threat to the national sovereignty of States would be strongly tackled. Cooperation, therefore, based on positive complementarity, would make it possible to overcome once and for all the fears of loss of power on the part of States as such, but always aiming at the purpose for which the Court was created in the beginning: to stop impunity and condemn all criminals.

[159] BURKE-WHITE (2008:63).

4 Between Positive Law and Customary Law: Lawful or contradictory decisions?

4.1 The UN Security Council powers in the Rome Statute

The International Criminal Court represents a huge step forward in the prosecution of international crimes. The overcoming of the characteristics of previous international criminal tribunals is the result of strong and profound debates within the international community during which so much criticism was raised against the modern concept of individual criminal responsibility and the normative structure created around it to put an end to impunity. The normative structure discussed in this study took into account as a starting point, in order to make an analysis as much complete as possible, the Rome Statute ratified with an unexpected speed at the time and which introduced new normative elements that had previously either not yet been codified or have been updated in form so as to make the whole process smoother and the institutions implementing it more legitimate. Secondly, the analysis saw as its protagonist the Charter of the United Nations, which represents a fundamental core of modern international dynamics, without which there would not have been the stability that characterized, at least apparently, the post-war period. Despite the fact that the United Nations has maintained a fundamental role in the processes of modern international relations, conflicts have followed one another in many geographical areas and for different reasons. However, what needs to be strongly affirmed is the importance that this organization has had in codifying the defence of human rights, a process that is now an integral part of many areas of the world, although several countries still remain below the internationally codified minimum standard.

In any case, the Security Council, which, despite so many controversies, continues to maintain supremacy in terms of international peace and security, has a leading role for the International Criminal Court because they legitimise it on the one hand, and de-legitimise it on the other.

I mean that if on the one hand the support of the United Nations towards the Court and the close relationship of proactive cooperation that characterizes them, allows the Court itself to play a leading role in the international field when it comes to international crimes, on the other hand the relationship with the Security Council, the decisions that the latter has taken at key moments in the history of the Court and the procedural structure that characterizes their relationship, have all been interpreted as a form of de-legitimization for the figure of the Prosecutor of the Court and the task of the Court itself to punish criminals accused of very serious crimes. Moreover, as has already been analysed, one element triggering disputes between the Court and member and non-member countries is the issue of the territorial and legal sovereignty of the States, a point on which various coalitions disagreed between those who

supported the task and responsibility of the Court and those who strongly criticised the consequences of interfering precisely in the national sovereignty of each State. Opinions will remain varied, as will the proposals that have been made in recent years and which will be put forward.

The alleged de-legitimization of the Court in the eyes of the international community, therefore, has seen as the main cause the actions and decisions that the Security Council has taken in crisis' situations and that have caused quite a few controversies both from a moral and substantial point of view.

In the negotiations that preceded the Rome Conference, the referral of the Council, then made explicit in Article 13(b), was considered from the outset as a necessary rule for a more correct and complete functioning of the Court and its jurisdiction. Over the years, however, it is precisely the referral of the Council and the possible deferral (which was seen as a supervisor clause for the Council which thought to act as a "watchdog"), enlisted in article 16, that has given rise to criticism of the Court and also of the Council itself, which has also been accused of using the Court as a tool for a new form of western colonialism; mainly the African Union has raised such criticisms, feeling as sacrificial victim of the legal neo-colonialism of the great western powers. The powers of the Council to extend the jurisdiction of the Court or to block its investigations have, however, had to contend with problems within the Council itself, which saw the great powers expressing their views differently on situations that needed rapid, decisive action and a united position of the Council, which was often paralysed by the exercise of the veto's power due exactly to its internal divisions. We may then summarize that the Security Council showed a double-faced attitude towards the ICC: on the one hand supporting it and reaffirming its importance, but on the other limiting its effectiveness by introducing some clauses in the resolutions for the referrals that economically complicated its actions and judicially limited its jurisdiction from politically motivated decisions.

4.1.1 UNSC Referral power (art.13b): between theory and practice

The Security Council's power to refer to the International Criminal Court is enshrined in article 13(b) of the Rome Statute. This mechanism that triggers the Court's jurisdiction opens to the Prosecutor the possibility and the duty to investigate possible international crimes; in this sense, it does not matter where the crime is committed or by whom because of the strict normative connection between the Rome Statute and the UN Charter that allows the Security Council to expand the ICC's jurisdiction in terms of *ratione personae* and *ratione loci*. Article 25 of the UN Charter states: "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"[160]. It is consequential that when the Security Council acts according to article 13(b) of the Rome Statute, referring a situation to the ICC, the Court is legally legitimized by the UN Charter to exercise its jurisdiction and to address international crimes, and States are bound to cooperate with it regardless their membership to the Rome Statute but because their commitment to the United Nations. So, for all the countries not parties of the ICC there is not a pre-existing obligation to cooperate with the Court, their obligations derive from the UN Charter; on the other hand, the duty to reinforce such cooperation in cases where States appear to be regretful still remains in the hands of the Security Council that has a spectrum of possible measures to take in order to achieve such cooperation by countries that show mistrust and hostility towards the Court. It is in the interest of criminal accountability that the possibilities within the reach of the Security Council may be employed at the expenses of political partisan interests of the Council itself. What more, the legitimization of the Council and the Court to address international crimes is reinforced by article 103 of the UN Charter in which is described the primacy of the obligations agreed under the UN Charter with respect to any other international agreement[161].

The spectrum of measures at the hand of the Security Council to ensure cooperation by States has been a resource the Council has almost never exercised and for which has received many criticisms by the international community.

In order to achieve a complete context of the normative structure of the relationship between the Security Council and the International Criminal Court we may look also at the discussions that preceded the Rome Conference and in which the procedural and regulatory model, that would be discussed during the conference itself, was analysed.

The idea of establishing an international judicial body to deal with criminal conduct in the international arena, after being discarded after World War II due to the reluctance of many States to cede national sovereignty, saw a resurgence of necessity from the 1980s onwards. It is the General Assembly

[160] UN Charter, 1945, Art. 25.
[161] UN Charter, 1945, Art. 103.

of the United Nations that restarts the debate by entrusting the task to the International Law Commission to prepare a hypothetical structural and normative model. If, on the one hand, the option of including a UN body, Council or Assembly, in the procedural system of an international court was initially seen as problematic due to the pre-eminence of the Council in the field of international security and peace and because of its veto system, the equality of all States before justice could have been controversial; with the success of the *ad hoc* tribunals of the early 1990s, this hypothesis gradually regained consideration and finally saw the supremacy of the Council in this regard. In any case, a veil of scepticism was strongly maintained with respect to the inclusion of the Council in the Court's prosecution mechanisms.
The Draft Statute of the International Law Commission included the possibility of the Security Council to intervene and to refer situations to the Court:

> "Article 23 (Action by the Security Council)
> 1. Notwithstanding Article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in Article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations"[162].

Article 23 was the ancestor of the current Article 13 of the Rome Statute, which introduced the Security Council into the procedural mechanism of the future court. From a structural point of view, the Commission's commentary on Article 23 essentially stressed the following:

> "The Commission understood that the Security Council would not normally refer to the court a 'case' in the sense of an allegation against named individuals. Article 23, para 1, envisages that the Council would refer to the court a 'matter', that is to say, a situation to which Chapter VII of the Charter applies"[163].

In December 1994, an *ad hoc* Committee was delegated to revise the Draft Statute[164]; scepticism was still present on the influence of the Security Council to the future judicial body in creation. The work of discussion and preparation for a complete and consolidated text of the future court continued since 1995 by the Preparatory Committee on the Establishment of the International Criminal Court: on the one hand some delegations supported the idea to give the Council the power to initiate proceedings to the ICC because they viewed its influence necessary to avoid the creation of more *ad hoc* tribunals which was considered impractical in the long term while on the other, the idea to leave the Council without any power whatsoever was seen, mostly by medium-sized countries as the fair compromise to avoid the permanent members of the Council to own a privileged role in criminal accountability;

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[162] Draft Statute for an International Criminal Court of the International Law Commission, 1994, Art 23(1).
[163] Report of the International Law Commission of 2 May–22 July 1994, *on the Work of its 46th Session*, UN Doc A/49/10.
[164] Resolution of the UN General Assembly of 9 December 1994, A/RES/49/53.

the main reason for the latter was that the Court would be subject to a political body, thus lacking credibility and independence. Moreover, this would have caused, in the eyes of the opposition, a lack of effectiveness of the Court itself which would have indirectly magnified the powers of the Council beyond the limit established by the Charter (actually it is believed in this study that the Charter does not really address concrete limits to the Security Council when it comes to international peace and security); and, finally, the idea of extending the power of veto in the dynamics of the International Criminal Court was seen as unacceptable. At the Rome Conference, only a small number of States mainly from Asia and Africa opposed a role for the Security Council in the triggering mechanisms of the future Court which was finally included in article 13 paragraph b and which is characterized by a fundamental aspect that must receive more attention: the jurisdictional expansion of the ICC.

Such expansion is based on the possibility given to the Security Council to refer any situation to the ICC regardless of the place the alleged crimes have occurred and of the nationality of the alleged perpetrators. According to that, the ICC expands its jurisdiction in prosecuting individuals who are nationals of States non-parties to the Rome Statute. While a State may not be a member of the Court, it will almost certainly be a member of the United Nations, that means it has ratified the Charter, which means it is therefore subject to compliance with its articles, including the aforementioned Article 25, according to which Member States are obliged to accept and respect the decisions of the Security Council[165], which in this case would have entrusted an external and independent judicial body with the task of prosecuting international crimes. There is therefore no doubt as to the importance of Article 13(b) to the scope of international criminal justice and the need for this article to be maintained in the normative structure of the International Criminal Court. It is also clear, on the other hand, that the only instrument for this normative structure to be respected in practice is at the discretion of the Council itself, which has the moral obligation and, at the same time, the legal basis[166] to take all the necessary measures provided for in the Charter to ensure the level of enforcement that the ICC lacks. In this aspect we can talk of complementarity between the Court and the Council, the former needing the latter in expanding its jurisdiction when necessary and in enforcing different measures for the fulfilment of its decisions. If all this in theory represents an adequately structured normative context that includes a form of universal jurisdiction that seems to be the logical counterpart for the task that the International Criminal Court possesses, on the other hand it has been shown that this structure is in reality a victim of reasoning that goes beyond pure criminal justice and that has subjected the Court to the world of politics by influencing its action and limiting its effectiveness.

[165] UN Charter, 1945, Art.25.

[166] Relationship Agreement between the International Criminal Court and the United Nations, 04 October 2004, Art. 17(3); Rome Statute, 2002, Art. 87 (5,7).

The case of the failed Syrian referral, fully represents this criticism that many scholars have raised against the Council, which has been accused of maintaining a double standard position in defence of the specific interests of its permanent members; the veto exercised by Russia and China, which shielded themselves from the western inconsistency (United States and Great Britain) in the decisions that followed throughout the Syrian's crisis, showed how the interests that these two countries tried to defend in the Syrian's context acted at the expense of criminal justice and, above all, once again called for changes to a system that needs a fairer filter in the situations to be reported to the Court and the spectrum of action of the Court in the international arena. At the beginning the Security Council referral was seen as the best way to reach international criminal accountability and to sort out all the weaknesses in terms of enforcement's measures and jurisdictional universality. If the Council is to put aside the political interests of its permanent members the possibility to maintain a structured normative framework around the International Criminal Court would be strong, on the other hand if the Council is to be subject to its internal division, guided by different geopolitical interests of the major powers, the Court will remain a judiciary only potentially effective. In this context, it is believed here that a revision of the structure of the Security Council is needed in light of the modern challenges the international community is facing. The multilateralism of today's international relations asks for a renewal, to allow new emerged powers to take a seat to the Security Council, a political body which does not represent the international balances any longer.

If this is not the case, other solutions may be found to address the limits the International Criminal Court is facing. The Security Council may be consistent in its referrals by voicing and adhering to criteria so that it is not seen as arbitrary in deciding which cases it refers to the Court. The Security Council should not use legal tools to pursue its goals, but then refuse to adhere to the law when it comes to its own activity. To effectively deal with the cases referred by the Security Council, it needs to be able to count on the full and continuing cooperation of all United Nations Members, whether they are parties to the Rome Statute or not.

It is also stressed the need for the Security Council's support in implementing the resolutions it takes and that require States to assist the ICC with its arrest warrants in order to improve the importance of accountability for those violating the law. Political considerations within the Council must therefore be reduced to zero when it comes to reporting situations of serious violations to the Court, thereby respecting the principles of international law and the rule of law and halting the selectivity that has characterised the Council's decisions on cases to be addressed to the Court. Moreover, the Council will have to focus on supporting its referrals through measures that ensure cooperation by States, and according to the present author it will be necessary to avoid political arrangements at the expense of justice, which in any case, as believed here, is complementary to peaceful transition processes and in no case can be

considered as a dangerous element for conflict resolution and as an element to be sacrificed to deal for settlements.

4.1.2 The Deferral mechanism (art.16): different *rationales*

The deferral by the Security Council is another of those rules which has been and continues to be the focus of attention of the international community and which has received the most relevant criticism.
Article 16 of the Rome Statute states:

> "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter 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"[167].

Many scholars consider that the importance of defining the barriers that circumscribe the use of deferral by the Council is aimed at dealing with situations of conflict between peace and justice.
The use of Article 16 in Resolutions 1422 of July 2002 and 1487 of June 2003 has shown that the Council exercised such power for other reasons, that it has a discretionary power that cannot be controlled and that there is a need for a better structuring of the rules which have to do with international criminal justice in the normative process of the ICC:

> "Acting under Chapter VII of the Charter of the United Nations,
> 1. 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 twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;"[168]

Specifically, recalling article 16 was a justification for shielding nationals of States non-parties from the jurisdiction of the Court.
Over the years, especially African States have drawn attention to the Council's power of deferral, including the African Union itself in 2008 calling for this article to be invoked to suspend the trial of Sudanese President Al-Bashir: the request was unsuccessful. Again in 2013, another request for suspension under

[167] Rome Statute, 2002, Art. 16.
[168] Resolution of the UN Security Council of 12 July 2002, S/2012/1422.

Article 16 was made by African States in favour of the newly elected Kenyan President and Vice-President Uhuru Keniatta and William Ruto. Both requests, after being discussed in the Council, were rejected with great indignation of Africans, who claimed that regional peacekeeping had been set aside in the face of pure political intent.
In detail, we can identify at least four elements characterising the deferral power under Article 16. The first, very evident and explicit in the article itself, concerns the temporal aspect that provides for a temporary suspension of the investigation, thus leaving room for possible discourse on the use that should be made of this rule, which should come into play only temporarily (for twelve months even if renewable under the same conditions) and with the specific purpose of avoiding escalation in a given conflict situation.
Secondly, the decision to suspend must be followed by immediate written notification from the Secretary-General to the President of the Court and the Prosecutor, this procedural condition should not be overlooked because it cancels any criticism, advanced by some State, that the Council implicitly suspending an investigation without an official communication in that sense would be acting inconsistently with article 16 of the Statute; it will be then for the Court to reply to the Secretary-General that it has received the communiqué and which action, if any, the Court intends to take. Also in this sense, the Relationship Agreement is not clear enough as regards the possibilities for the Court to take action against the suspension, the only thing we can say with certainty is, that it is at least entitled to analyse the validity of the deferral because "the Court shall satisfy itself that it has jurisdiction in any case brought before it […]"[169].
The third element to be emphasized in the analysis of Article 16 is the *condicio sine qua non* of the Council which must act under Chapter VII for the resolution to be valid. This point reinforces the Council's power to defer to its primary responsibility for international peace and security. It is only in genuinely critical cases, a criticality that poses a threat and which is reflected in Article 39 of the Charter, that it should be possible to have recourse to Article 16 of the Statute.
In the final analysis, it seems reasonable to suppose that the Council should act on a case-by-case basis and that the suspension should therefore be specific and aimed at concrete investigations, thus avoiding the creation of disputes by precluding categories of persons (as the case for Resolutions 1422 and 1487) and/or categories of crimes from being brought before the Court. Furthermore, the validity of the suspension under Article 16 should not apply to upcoming situations, crimes not yet committed and defendants not yet charged with any crime. The legal consequences for the Court of a deferral request by the Council is firstly represented by the possibility to address the validity of such request on a legal basis but, there is no room for the Court to determine whether or not the Council acted under Chapter VII of the UN Charter: if such request ends in the Office of the Prosecutor and to the President of the Court

[169] Rome Statute, 2002, Art. 19(1).

seems logical to believe that the investigation in question is suspended for a period of twelve months.
For what concerns the practical implications of a deferral, we must say that there is no possibility for the Council to intervene in all the other aspects related to the investigation that has been suspended; moreover, it should be noted that Article 16 makes explicit the suspension of the start of an investigation or the continuation of a prosecution[170] but does not mention all the aspects that characterize an investigation or a prosecution as a whole. Consequently, everything concerning collateral elements remains at the discretion of the Court; the Rome Statute in this regard clarifies that the Prosecutor may "Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence"[171]; the Pre-Trial Chamber may

> "Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;"[172].

While it is true that for a deferral to be legally valid it must comply with the necessary fulfilment condition of article 39 of the UN Charter, the question that arises is: what happens if the deferral meets the requirements and is therefore valid under the UN Charter but not under the Rome Statute? It is certainly true that the powers of the Council under the Charter cannot be bound by the Rome Statute in any way and that the conditions set out in article 16 are only necessary for the determination of validity of the deferral under the Statute; in this sense, the powers of deferral of the Council under the Charter are bound only by the obligation of take actions under Chapter VII of the UN Charter. According to Cassese, the Security Council may exercise its powers of deferral only when a specific investigation or prosecution may jeopardise international security or may become a clear threat to the international peace[173]. All other possible limits to the powers of the Security Council are enshrined in article 24 of the Charter which states that the Council "shall act in accordance with the Purposes and Principles of the United Nations"[174], even if according to many scholars they are general norms rather than concrete limitations[175]. For all the other international norms, the ones that bind the Security Council beyond any reasonable doubt still remain the ones of *jus cogens*[176]. For what concerns the deferral power of the Council under article 16, it has never been used but yet it has been mentioned four times. The first two were resolutions 1422 and 1487. Both of them were adopted after

[170] Rome Statute, 2002, Art. 16.
[171] Rome Statute, 2002, Art. 54 (3f).
[172] Rome Statute, 2002, Art. 57 (3c).
[173] CASSESE (1999:144).
[174] UN Charter, 1945, Art. 24(2).
[175] KIRSCH (2012a:1256).
[176] KNOTTNERUS (2014:206).

strong pressure of the U.S. which was reluctant of the possible intervention of the Court's jurisdictional powers in operations guided by the UN and pressured to exempt all individuals from non-member States of the Court from its possible action, even threatening to veto the same UN operations until such action was taken. Those resolutions are invalid under the Statute, because article 16 provides for the suspension of concrete investigations of prosecutions, leaving out of its reach abstract situations and a specified category of individuals[177].

The other two cases of mention of article 16 were resolutions 1593 and 1970, accordingly of 2005 and 2011 by which the Security Council referred the situation in Sudan and the situation in Libya to the ICC; in both cases the action of recalling article 16, as analysed in the previous chapter, was a demonstration of complete control of the investigations that could have been stopped or suspended whenever it considered necessary and a way to satisfy those worried that such referrals could have worsened the peace-making process in those countries. The exemption clauses were included also in these resolutions but without any temporal limitations making them invalid under article 16 of the Statute which provides for an explicit declaration by the Council. The only thing that seems to be certain is the variety with which the issue of deferral by the Council has been dealt with, in which even the different members maintaining a temporary sit within the Council have identified several reasons why a deferral would appear to be justified or not. At least four different rationales seem to have found support as well described by Knottnerus and which he calls preventive, responsive, instrumental and of last resort[178]. In the first case, it seems that the Council's intervention can be justified by a preventive deferral when the Council considers it necessary to suspend the work of the Court because it foresees an inevitable worsening of the conflict which could create dangers in terms of international peace and security. In this case, the need to refer to Article 39, at least in the strict sense, would seem to be in vain; for this reason, it may be assumed that the work of the Court would become a series of arguments that go beyond criminal responsibility and the quest for justice, but would lead back to geopolitical calculations[179]. The case of the first request for deferral of the Al-Bashir investigation would seem to fall within this model, which, as known, was strongly rejected by the Council. In the second interpretation, the requirement of Article 16 would turn into the negative consequences that the Court's intervention has caused and that are tangible. It would have a responsive role in tackling the instability the Court's may have participate to enlarge through its intervention. The subsequent request by African States to suspend the investigation of the Sudanese President could be assimilated to this case, which would have caused further problems for the already very complex political process in Sudan[180].

[177] KNOTTNERUS (2014:203).
[178] KNOTTNERUS (2014:216).
[179] KNOTTNERUS (2014:216).
[180] KNOTTNERUS (2014:217).

The third situation as described by Knottnerus is considered instrumental because it provides a compromise in terms of peace and justice. Losing part of the procedural possibilities to facilitate a peaceful transition in an ongoing conflict does not, however, seem desirable, let alone the ultimate goal of possible future reform, both in terms of interpretation and, if necessary, in structural terms[181].

Lastly, a deferral as an ultimate measure of last resort would include a problematic precedent that can be invoked in the future, placing serious doubts on the already much-discussed independence of the Court. It has to be said, however, that this option would seem to be the one that comes closest to the literal meaning of Article 16 and the meaning that was supposed to embody during its drafting. A threat to peace by reference to Article 39 would therefore seem to be the most credible option, especially in a situation where no major alternatives are envisaged[182]. As we have seen, therefore, the main controversy over Article 16 of the Rome Statute, which describe the deferral by the Security Council, is an interpretative and not a structural one. The question, therefore, does not concern the scope of the suspension of the investigation or prosecution, which, as we have analysed, does not include all the secondary elements, but rather the problem lies in the interpretation to be given to the article, that is, when the Council can invoke it. In this study, the preferential hypothesis, first of all, provides for a review of the decision-making processes in the Council in international peace and security matters, which then, with regard to the Court, would be reflected in a more legitimate interpretation and which should require the intervention of the deferral in cases of clear and highlighted threat to international peace and which would otherwise have no other peaceful and democratic solution to a hypothetical conflict.

In any case, it is useful to reiterate once again how the regulatory structure approved through the Rome Statute has clearly made progress in seeking to end impunity, and from a legal point of view what these first two decades of the Court's existence highlight that we may look for greater independence in terms of scope and legitimacy in the eyes of the international community.

[181] KNOTTNERUS (2014:217).
[182] KNOTTNERUS (2014:217).

4.2 The Security Council influence on the ICC

Where is international criminal justice (criminal competence moved from a national to an international level) directed to, in relation to domestic criminal justice (State's jurisdictional authority to address criminal conduct)? This question is a necessary step in trying to assess the future possibility of the International Criminal Court and its role in relation with domestic's claims still limiting its enormous potential. It is noteworthy to remind that an international tribunal as the ICC which deals with crimes globally recognized as of the worst kind, may be given jurisdictional authority to intervene almost everywhere without geographical limitations, at least theoretically. In this sense, the most important element to be taken care of, and which by the way echoes on other technical aspects, is the possibility for the ICC to achieve universal jurisdiction which would lead the Court to play a primary and fundamental role in terms of criminal accountability. On the other hand, the Security Council represents the main actor in ensuring international peace and security from an executive and political perspective. The relationship with the International Criminal Court in this sense, if framed more comprehensively, would allow the international community to have, on the one hand, an executive actor able to address any international claim in terms of political actions and diplomatic pressure for peaceful stabilization; and on the other, a judicial actor able to address criminal accountability regardless the modalities of the crimes assessed. The relationship among them would be based, according to the present author, to a complementary mechanism, not precluding powers and responsibilities among themselves.

Instead the influence of the Security Council over the International Criminal Court until today, seems to be beyond discussion; what needs to be addressed is how this influence can endanger the independence and impartiality of the ICC and which are possible legal solutions that can help such relation to become more just in terms of international legitimacy.

Normatively speaking, the first elements needing a restructuring are the referral's power and deferral's power of the Security Council under the Rome Statute. Article 13(b) and article 16 which enshrines such powers do not strictly define the boundaries within which the Council may use such trigger mechanisms. Firstly, the discretional freedom of the Council in referring or deferring cases to the Court, does no more than de-legitimize the Council itself and the ICC in the eyes of the international community; accordingly, this de-legitimization is evident when an executive body as the Council takes advantage of certain regulatory weaknesses to use an impartial judiciary for political ends, thus achieving selective justice. On the other hand, the Court is de-legitimized because if it is true that it bases its effectiveness on the principle of cooperation between Member States and its status as a permanent Court based on an international treaty, it is also undeniable that a judiciary on which there is always the shadow of a deferral of the Council that would cause the suspension of investigations, no longer represents any form of justice universally recognized but which once again defines the supremacy of the

world of politics and economic interests of the strongest representatives of that world. Such discretional power of the Council to decide which situations may be investigated by the Court and which may not, represents the greatest limitation for the Court itself, which sees its scope restricted and is obliged to act no longer according to the seriousness of the offences and crimes falling within its jurisdiction but according to politically guided compromises which have nothing to do with the independence and above all the impartiality of a judicial body, whether national or international. Furthermore, another serious breach of justice as such is evident in the deliberate inclusion of certain paragraphs in Council's resolutions reducing the jurisdiction *ratione personae* of the Court by protecting a certain category of persons from its investigations as we have seen in the Resolutions referring the situations in Darfur and Libya. All of this seems to be the result of an unclear or at least not well-defined legal framework which suggests that the States wish to maintain a certain level of discretion and leverage in this area. On the assumption that a pure relationship between these two bodies can only favour justice in absolute terms, the amendments that can be made to Article 13(b) seem to be at a distance from a literal amendment to approach those elements that are external to the Statute but which strongly influence the meaning and consequently the use of that provision. First, a change in the voting procedure for the referral of cases by the Security Council to the International Criminal Court seems to be necessary to ensure its impartiality and promote its legitimacy in the eyes of the international community. The voting method within the Council and the veto's power of the P5 represent the major limit for this body, democratically because it is undeniable that such voting procedure does not represent the international *equilibria* any longer; practically speaking because the Council is paralyzed in its decisions and actions when the permanent members take different positions on the same issue (the failed Syrian's referral in this sense represents such paralysation perfectly); or because even if a referral finds the unanimity in the adopting-process, the legitimacy of such decision is still under the prejudice that such organ does not represent the international community as a whole. In that sense, the General Assembly seems much more legitimate in addressing criminal accountability through the International Criminal Court: such aspect may be well discussed taking into account the primary responsibility of the Security Council in terms of peace and justice.

Amendments of the UN Charter are provided for in the UN Charter itself and conjugated in Articles 108 and 109, which also define the modalities.

It is clear, in the light of these two provisions, that the will of the permanent members of the Security Council is necessary for the purposes of any amendment: it is clear, therefore, that even before a regulatory discourse, a moral one should be addressed, and it is only when a unity of intentions is achieved that regulatory changes would benefit the objective of a more effective Court and a more universal justice. For what concerns article 16 and the deferral's power of the Council, a strict interpretation of such norm must be found, the present author considers article 16 as a last resort instrument in the hands of the Security Council that must be used only as such. In this

context too, the General Assembly would provide a more legitimate and effective use of such provision but still the primacy of the Security Council in terms of international peace and security may be addressed before any amendment or decision is taken. What more, the Security Council must consider seriously and much more deeply the possibility to provide for counter measures for the lack of cooperation of State Parties to the Rome Statute in relation with the decisions taken by the Court (*i.e.* arrest warrants), when the investigation in question is referred to the Court by the Council itself; as stated by the President of the ICC during its speech to the General Assembly:

> "There is, however, one area – the execution of arrest warrants – where the lack of successful cooperation presents a major obstacle to the Court's ability to carry out its mandate. An important aspect of this worrisome state of affairs concerns the United Nations. More than half of the outstanding arrest warrants – eight, to be precise – relate to situations referred to the ICC Prosecutor by the Security Council. The obligation of the governments of Sudan and Libya to cooperate fully with the ICC stems from resolutions of the Security Council adopted under Chapter 7 of the Charter. I urge the Council to take concrete measures to ensure compliance with the Court's requests for cooperation addressed to the governments of Sudan and Libya, in particular for the arrest and transfer of the suspects currently at large"[183].

The necessity of such cooperation by the Security Council is becoming day by day even more relevant due to the lack of enforcement powers of the Court that is not able to exercise its judiciary proceedings without the support of the Security Council in terms of sanctions and diplomatic pressure against those reluctant States. In any case, it is unlikely that the constantly changing balances of power within the Security Council can be set aside at the moment and in this international context for an ideal as pure and just as the sense of justice. It also seems obvious that, at least for the moment, this kind of discourse is being addressed superficially by an international community that is facing and will continue to face much more urgent problems of geopolitical stability.

[183] Speech of Judge Chile Eboe-Osuji, President of the International Criminal Court to the UN General Assembly of 4 November 2019.

4.3 The future of the International Criminal Court

Even if the ICC does not work at all as a perfect tool, considering that the threat to those in power of one day being held accountable for their actions makes it possible to consider the development of criminal justice in the international arena a huge success. Compared to a few decades ago, there is now more attention and more widespread condemnation not only of atrocities occurring elsewhere, but also of the lack of action to intervene and punish those responsible. In addition, the laws defending the sovereign State and the laws on immunity from prosecution are gradually crumbling in favour of legal proceedings against violators of international standards who previously had no corresponding judicial power to support them. Despite this, the legitimacy of The Hague's Tribunal is increasingly being questioned. Often the criticism of the Court is legal as well as political. There is a clear imbalance between what victims hope to find in terms of justice and what the Court is able to offer; in other words, the objective notion of justice elaborated to enhance the Court's role and legitimise it globally seems to have provoked much more controversies. The accession to the Rome Statute, the founding treaty of the ICC, has almost come to a halt. As time goes by, tensions between African States and western States intensify sharply. The loss of the Court's legitimacy is plain for all to see. Bearing in mind that the mechanisms of justice, including criminal trials, only work when they are legitimate, it is clear that in the case of the ICC, justice is neither recognized nor accepted, and the exercise becomes pointless. This constant reduction in legitimacy can also be justified by a varied interpretation of justice. Many studies have shown that there are differences between different populations with regard to the concept of justice but also within the same community: moreover, this idea is even stronger when it comes to specific events that are judged differently according to the level of involvement. Some scholar considers much more useful to accept the critiques of a political motivated body in order to achieve a better understanding of the world dynamics and to strengthen the instruments at the disposal of the Court to act more effectively; the Court may also accept the critiques that are moved against it and openly discuss them to show openness and transparency of intents as recalled by De Hoon:

> " […] By ignoring and denying such critique, it is not only not going away, the Court in fact counterproductively allows its opponents to mobilize the justified and constructive critique for the anti-ICC camp. It is time to change that course […]"[184]

The major problem of the Court in my opinion is represented by the impossibility to mediate among the political interests that move the Council to which is so linked on the one hand and the transitional justice's processes that appear to be unjust to many countries that still raise sovereignty's claims

[184] DE HOON (2017:611).

on the other. The importance of so-called transitional justice is anyway beyond doubt and the set of mechanisms that characterise it complement each other in carrying out the deterrent or preventive, restorative, judicial and retributive functions that they perform; the problem lies in the fact that a top-down Court such as the ICC evidently does not respond in a concomitant and comprehensive manner to the expectations that the victims as well as the international community, at different levels, place in it. Contemporary international criminal justice has generated a field of law that is rationalized around the idea that both the individual and humanity as a whole need protection by the legal system; to this end, an attempt has been made to break the assumptions and structures of an international legal system that is built predominantly around the consent of the State which in most cases maintains a strong reluctance against a supranational authority. A compromise must be found in this sense, the Court must be given much more authority in terms of jurisdictional and enforcement powers regardless its supposed political-based decisions. I mean that, as recalled by De Hoon, even if many attack the Court of being politically motivated, such attack may not preclude the work of the Court, on the contrary, a political and polarized discussion would be very helpful for the Court which must be looking for a new reconceptualization of what can be offered to the victims and which expectations may not be satisfied[185].

I believe that by structurally modifying the relationship with the Security Council and thus avoiding a political influence, at least as evident as today, and then reconceptualising the objectives of the Court in materialistic terms for the victims and trying to resolve the jurisdictional and enforcement limits that the Court faces on a daily basis, we can really establish a mechanism of criminal responsibility that is first a strong deterrent and then a retributive instrument. The key element, at the basis of any reasoning in this field, is the will of the States which remains the first breaking point in any discussion of international criminal justice. Such will is the first element to be better addressed and discussed in order to achieve a unity of intentions without which the effectiveness of international judiciaries appear to be doomed to impotence. The advances of international criminal law on the one hand see the danger of being arrested by what Damaška calls "overabundance"[186] of goals that international criminal law developments have bought into the debate as within the possibilities of international courts such as a retributive and a deterrent function, stopping ongoing conflicts through judicial processes, making an historical record of international crimes, making advances in the field of international criminal law, giving voice to the victims through their direct involvement in the judiciary as witnesses and not just as public and many others; an aspiration a bit presumptuous maybe, given that even national systems, with their enforcement powers and the institutional support they enjoy, are struggling to respond quickly and effectively if not also to respond

[185] De Hoon (2017:614).
[186] Damaška (2008:331).

in the first place. On the other hand, the advances of the phenomenon of international criminal law some conceptual element on which the procedures are based, must be rethought in order to find an innovative perspective. The relationship with the Security Council is still today, for the present author, the biggest challenge for the International Criminal Court in terms of independence and legitimacy. Such relationship must be revised to a more integrated model which may give much more discretion to the ICC when assessing criminal accountability; I consider necessary another elaboration of the deferral power of the SC which should be filtered taking out from the Council the discretion it uses in deferring cases to the Court according to political motivated reasons. The referral power under article 13 (b) could be called into question by the voting mechanism in the Council, which can remain deadlocked through the power of veto; in this sense, the majority of the permanent members of the Security Council must choose on which side to step. 3 out of 5 did not ratified the Rome Statute but it is thanks to them whether a referral to the ICC is adopted or not: a relevant weakness of the entire system which influences the authority of the Prosecutor and make the Rome Statute system as a whole just as western-oriented as many other international institutions are accused to be.

4.4 Proposal for an Independent Expert Review of the ICC

The life of the International Criminal Court has been characterized by a strong innovative process of the international judicial system's potential, but it certainly leaves controversies due to an evident procedural and jurisdictional deficiency that does not allow an effective and complete action. It is at the basis of this principle that on 7 May 2019 the Presidency of the Court and the President of the Assembly of State Parties met and discussed the proposal of an Independent Expert Review (also "IER") of the Court's performance and more generally of the Rome Statute system. They then sought to identify possible areas of analysis for a review of certain elements in the structure of the international criminal law mechanism in order to remedy its weaknesses and improve its positive aspects. To make official the meeting of the 7th of May the President of the Assembly of States Parties received an official letter from the Presidency of the Court, dated 24 May 2019, which in paragraph 3 reads as follows:

> "[…] it is an opportune time to conduct an independent arm's-length expert review of the Court's functioning and its performance capacity, including those factors - internal and external - that impact its performance, with a view to making concrete recommendations for enhancing the Court's ability to effectively carry out its mandate under its founding treaty, the Rome Statute. Such a review is considered essential for addressing a range of challenges and expressed concerns in relation to the Court's work and operating environment, and for ensuring that the Court can deliver on its mandate in a sustainable manner in the years to come, with the overarching objective of strengthening the Rome Statute system as a whole. […]"[187].

An in-depth review of the mechanisms beyond the work of the International Criminal Court is necessary for the restructuring, where needed, of the procedures of the ICC. It is indeed a good practice already successfully applied to other international tribunals such as the ICTY, ICTR[188], SCSL[189] and ECHR[190]. It is a great opportunity for the ICC to improve its effectiveness and to achieve more international credibility through a review based on objectiveness, independence, openness, transparency and inclusiveness. Such task is characterized by the assessment of a Panel composed only by experts of international criminal law and with a high degree of experience in this field to conduct an investigation and to maintain a discussion with all the relevant

[187] Note to the President of the Assembly of State Parties of 24 May 2019, *on the Proposal for an Independent Expert Review of the International Criminal Court*, p. 1.
[188] Report of the Expert Group of 22 November 1999, on *Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, A/54/634.
[189] Report of the Independent Expert Antonio Cassese of 22 December 2006, *on the Report on the Special Court for Sierra Leone*.
[190] Report of the Right Honourable the Lord Woolf of December 2005, *on the Working Methods of the European Court of Human Rights*.

stakeholders as well as all the organs of the Court and officials, the States Parties and civil society organizations.
During the 9th Plenary Meeting of the 6 December 2019 the Assembly of States Parties adopted by consensus Resolution 7 on the Review of the International Criminal Court and the Rome Statute's system[191], which finally paved the way for the Panel to begin work from 1 January 2020. Such resolution defined the points on which to base the work of the experts which were noted for the Panel, mainly based on three macro areas of the Court: governance, judiciary, investigations and prosecutions[192]. The final report shall be submitted for September 2020 to the Bureau and the Assembly of States Parties[193]. The mandate for the Independent Expert Review is to strengthen the overall functioning of the Court and the Rome Statute system to achieve a stronger effectiveness of its work and its legitimacy in the eyes of the international community thanks to a thorough review of a technical nature of processes, procedures, practices, and the organization of and framework for the Court's operations while upholding the key principles of the entire system namely the integrity, complementarity, judicial and prosecutorial independence of the Court[194].

[191] Resolution of the Assembly of States Parties of the ICC of 06 December 2019, ICC-ASP/18/Res.7.
[192] *Ibidem.*
[193] *Ibidem.*
[194] *Ibidem.*

FINAL CONSIDERATIONS

This analysis has attempted to demonstrate, on the one hand, the importance that the International Criminal Court has had and is having in terms of international criminal accountability, proposing itself as an important representative of its *ad hoc* predecessors; on the other hand, it seems clear that there is a need for a renewal of some aspects of the normative model and the system of the Rome Statute.

From a normative point of view, the wide variety of objectives that the Court has stated sometimes seem to be in conflict with or at least significantly reduce its judicial effectiveness by complicating its procedures and mechanisms. It is certainly possible to say that the progress made over the last 20 years has been significant and auspicious for the future, but at the same time it is necessary to underline its great weaknesses which, in any case, gradually reduce its international credibility. As described above, the Court has priorities that need to be discussed in greater depth for a possible regulatory change that would substantially translate into greater judicial discretion and investigative possibilities. The relationship with the Security Council, which was theoretically established as the stronger point of the Court (power of referral and deferral) has proved to be, in reality, the weaker one receiving many criticisms, especially from those States that have suffered the most from it.

It is therefore necessary to support a greater discretion and independence of the Court from the political decisions of the Council, especially taking into account the imbalance that characterizes the members of the Council with their respective non-ratification of the Rome Statute (U.S., Russia and China). The international community will need to make greater efforts to try to influence these major powers, which must necessarily ratify the Rome Statute if they are to demonstrate once and for all their commitment to the protection of human rights. A second enormous problem that the Court cannot ignore are the jurisdictional limits within which it must comply with its mandate; it is necessary to distance the extension of its jurisdiction from the Council's referral in order to give a strong deterrent signal and to achieve that legitimacy the Court needs so much; the same legitimacy that the Council itself is losing, probably because it is the founder of a geopolitical model that no longer represents international balances and dynamics in any way.

I believe that by structurally modifying the relationship with the Security Council and thus avoiding a political influence, at least as evident as today, and then reconceptualising the objectives of the Court in materialistic terms for the victims and trying to resolve the jurisdictional and enforcement limits that the Court faces on a daily basis, we can really establish a mechanism of criminal responsibility that is first a strong deterrent and then a retributive instrument. The key element, at the basis of any reasoning in this field, is the will of the States which remains the first breaking point in any discussion of international criminal justice. Such will is the first element to be better

addressed and discussed in order to achieve a unity of intentions without which the effectiveness of international judiciaries appear to be doomed to impotence. The advances of international criminal law on the one hand see the danger of being arrested by what Damaška calls "overabundance"[195] of goals that international criminal law developments have bought into the debate as within the possibilities of international courts such as a retributive and a deterrent function, stopping ongoing conflicts through judicial processes, making an historical record of international crimes, making advances in the field of international criminal law, giving voice to the victims through their direct involvement in the judiciary as witnesses and not just as public and many others; an aspiration a bit presumptuous maybe, given that even national systems, with their enforcement powers and the institutional support they enjoy, are struggling to respond quickly and effectively if not also to respond in the first place. On the other hand, the advances of the phenomenon of international criminal law some conceptual element on which the procedures are based, must be rethought in order to find an innovative perspective.

How can the international community deliver a universal jurisdiction to the ICC is a question still without a proper answer; the difficulties are many, from the reluctance of States to lose more national's power and to be more subject to the ICC to the problematic mechanism with which to regulate such universality. In such contest, the present author considers the General Assembly of the United Nations a fundamental actor in the renewal process because it better represents the international community as a whole. Such representation would be more legitimate and the decisions within the GA may be more problematic due to the high degree of State's representation but at the same time more legitimate and surely such decisions would concretely be supported by member States. Such organ of the UN can also play a part in the renewal of the Security Council decision-making process that after decades of useful cooperation and balance of power, today is being challenged by a multilateralism that does not envision the prerogatives of its permanent members, which in any case according to the Charter may accept such renewal. Those relevant challenges will be the key assessments for the long-term stability of the International Criminal Court and its legitimization in front of the international community which, in part, is strongly critical against its work. It is undeniable, anyway, the fundamental role the ICC can play in the next decades in making those responsible of serious human right's violations, to be held accountable, making justice for peace's stabilization processes.

[195] DAMAŠKA (2008:331).

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ABSTRACT

Introduction

After having shortly described the history of the international criminal justice during the last two centuries, this thesis has the very first objective to analyse from a theoretical perspective all the instruments useful in the first-instance analysis when dealing with the existence of mass atrocities, the range of intervention the international community has, as well as the legal possibilities to punish the offenders of such crimes, introducing and analysing the only permanent international institution with the conferred authority to make justice in case of the most serious international human rights' violations: the International Criminal Court. ("ICC"). What makes the long-term significance of the Rome Statute's system fundamentally different from earlier efforts is its potential for the prevention of future crimes. The potential for preventive effect appears in several different forms, perhaps under the broad heading of inhibition, timely intervention, stabilization and norm setting. A fundamental part of this analysis will be focused on the United Nations, the international actor that started the long process that led to the creation of the Court and the relationship between them, which is still today, after seventeen years from the entry into force of the Rome Statute, quite controversial. Specifically, this work will focus on the United Nations Security Council ("UNSC") and the practise of referring situations to the Prosecutor of the ICC, whereas from a juridical point of view, the UN Charter and the Rome Statute will be analysed for what concern the legal elements necessary for the description of such balance of powers between the Court and the UNSC and most importantly, for the capacity of the Court to make violators of human rights really accountable. It follows a description of the general framework in which the ICC has worked and the specific resolutions of the UN Security Council that gave birth to controversial challenges to the independence of the Court and the politically motivated influence of the UNSC Permanent Members ("P5") in terms of peace and justice. It is argued here, the Security Council started to improve its, already huge, global influence after the creation of the Court with respect to other international actors. The possibility to refer a situation or to defer a case from the ICC gives the Security Council a discretional power that allows a greater control of the international sphere from prosecuting an individual accused to break the law to the possibility to threat States with investigation of nationals for the accusations of crimes considered of international gravity that would undermine their position in the international relations and mitigate their diplomatic influence. The research will try to understand whether or not the Security Council acted due to politically motivated schemes or just resorted to the ICC for pure values of justice and accountability. It may be surprising to understand the thin thread that links the permanent members of

the Council and their ability to sacrifice the sense of justice, which is the basic value of the creation of the Court itself, to give precedence to all those geopolitical interests that characterize the world of diplomatic and international relations. Finally, a revision of some legal element characterizing the relationship between the ICC and the UNSC is given to future investigations bearing also in mind the recent proposal for an Independent Expert Review of the Court, advanced by the Presidency of the International Criminal Court and dated May 2019.

1.1 The International Criminal Court (ICC)

The International Criminal Court is made up by four organs: The Presidency, the Judiciary, the Office of the Prosecutor and the Registry which provides logistical support to the other three parts of the Court.
The Rome Statute's system introduced a framework within which the ICC has been developing its mandate, that changed the perspective used by the *ad hoc* tribunals of the past decades. Such differences will be addressed during this study in order to have a comprehensive understanding of which normative and conceptual elements the international community may improve to achieve purer international justice's processes. The triggering mechanisms of the International Criminal Court were widely discussed during the preparing works and were finally three: the State Party referral which has been a key factor in the first years of the ICC, the Security Council referral and the Prosecutor acting *proprio motu*.

1.2 Preconditions to the Exercise of Jurisdiction

The crimes covered by the Statute of Rome are enshrined in article 5 which states:

> "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
>
> (a) The crime of Genocide;
> (b) Crimes against humanity;
> (c) War crimes;
> (d) The crime of aggression"[196].

The Preconditions for the Exercise of Jurisdiction enshrined in article 12 define the tight connection the Court has with States parties to the Rome

[196] Rome Statute, 2002; Art.5.

Statute and States not parties that accept the jurisdiction of the Court for a specific situation, describing in which cases the Court has the legal basis to intervene in analysing the supposed crime in question.
Paragraph (1) of article 12 states: "A state which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5"[197]. The jurisdiction of the Court is limited in its subject-matter, not because there are no other crimes of international gravity which may be punishable but because those other crimes, by majority, are already well addressed by national courts or in any case not of sufficient gravity as the ones under the jurisdiction of the Court or because the new wave of international crimes still needs the establishment of a normative framework. In every case, what makes them similar is that the humanity as a whole is considered the victim and then it is legitimate to punish them internationally: this reasoning is valid for the ones covered by the ICC as well as for the ones today called "transnational crimes" such as slave trade, hijacking and terrorism[198]. Paragraph (2), recalling article 13 which deals with the exercise of jurisdiction of the Court, assures that the Court may exercise its jurisdiction only if the States where the crimes occurred (territorial State), the States of which the person accused is a national (nationality State), are already members of the Rome Statute or have accepted its jurisdiction through a declaration lodged with the Registrar[199]. The territorial limitation is here expressed, a clause that demonstrates how difficult was and probably will ever be, to support international criminal justice when it means, as to say, devaluating national sovereignty. The temporary clause enshrined in article 11 (1) of the Statute states that the Court has jurisdiction only over crimes occurred after the entry into force of the Rome Statute namely 1 July 2002[200]. The temporary clause goes more in depth establishing that the Court has jurisdiction over a State party to the Statute only if the crime in question is subsequent to the entry into force of the Statute for that State[201], that means, for instance, that Mexico which has ratified the Statute in October 2005, three years after its entry into force in July 2002, cannot be prosecuted for conduct prior of October 2005.
Article 12 (paragraph 2a) establishes that the Court has jurisdiction concerning crimes occurred on the territory of States parties, regardless of the nationality of the offender[202]. The other possibility for the Court to possess jurisdiction is through an *ad hoc* declaration of a State that temporarily accepts the jurisdiction of the Court for the crime in question[203].
The jurisdiction *ratione personae* stated in article 12 affirms that the Court may exercise its jurisdiction over a person, accused of having committed the

[197] Rome Statute, 2002; art.12 (1).
[198] SCHABAS (2017:75).
[199] Rome Statute, 2002; Art.12 (2), (3).
[200] Rome Statute, 2002; Art.11 (1).
[201] Rome Statute, 2002; Art. 11 (2).
[202] SCHABAS (2017:66).
[203] Rome Statute, 2002; Art.12 (3).

crimes covered by the Statute, who is a national of a member State of the ICC or has accepted its jurisdiction according to paragraph 3[204]. It was the clearest form of jurisdiction the negotiators established during the Rome Conference, the minimum requirement to ensure a standard range of possible targets for the Court but still with some exceptions. The first exception is stated in article 26 which envisages the exclusion of jurisdiction over persons under eighteen at the time of the alleged commission of a crime[205].

1.3 Exercise of Jurisdiction (art.13)

In spite of being enumerated as the first triggering mechanism, the State Party referral was always imagined as the less efficient one even during the Rome Conference foreseeing the scepticism of the States to bilaterally complain against other States. What was predicted to be an inefficient condition ended up introducing a systematic procedure at least during the first decade from the creation of the Court, namely the so called "self-referral".
The first one has been conducted by the Government of Uganda in 2003, even if as recalled by Schabas, it appeared clear it was the same Prosecutor of the ICC to ask the Uganda's Government for the referral, ensuring the prosecution of rebel forces leaders without taking into account any governmental participation[206]. After few months from the first self-referral in the history of the ICC, the Democratic Republic of the Congo submitted a referral request to the Registrar in March 2004. The Central African Republic followed the same procedure almost a year later in January 2005. Both referrals of Congo and CAR gave the go-ahead for the first trials at The Hague.
The 4th case was presented to the ICC in 2012 thanks to the self-referral of Mali formulated for the supposed inability of national courts to prosecute crimes committed in the north of the country.
"The referral must be in writing"[207] because it represents the political will of a State to cooperate, which may be already included in the ratification procedure of the Statute by a State but need, in any case, to be made explicit.
The Security Council Referral is enshrined in Article 13 paragraph b which confers, jurisdictionally speaking, the power to the Court to open an investigation when the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court. Moreover, the Security Council can broaden the Court's jurisdiction geographically but it cannot trigger the ICC's jurisdiction for a case that does not respect the temporal clause of the Rome Statute, meaning that the UNSC cannot make the Court open an investigation over a crime occurred prior to the entry into force of the Rome Statute. It is

[204] Rome Statute, 2002; Art.12 2 (b).
[205] Rome Statute, 2002; Art.26.
[206] SCHABAS (2017:145).
207 Rules of Procedure and Evidence of the International Criminal Court of 3-10 September 2002, ASP/1/3, pp.0-107, Rule 45.

quite clear then, that the Security Council possesses an important instrument to activate the ICC's investigations but at the same time it has to work within some jurisdictional limits it cannot overpass. The referral of the Security Council was considered the most important instrument of the Statute of Rome to fight crimes of international gravity but ended up becoming the most debated norm of the Rome Statute not only for what concerns the legal nature of it but, above all, because of its politically motivated use. The analysis needs to be more deep on the Security Council power to confer (and to defer) jurisdiction to the Court when the Court does not possess it, because on the one hand it can be showing the positive will the negotiating delegates had during the Rome Conference towards a more comprehensive international criminal justice but on the other hand, it represents, as many have already claimed, the free pass for the Security Council to control an independent judicial institution which should be a global defender of human rights free from every kind of influence, which *de facto*, it is not. Furthermore, it is useful now to remind that not all, among the permanent members of the Security Council, have ratified the Rome Statute but still maintain the power to trigger the ICC or to block actions, a process that seems to have some controversies in its basic conceptual foundation even more than its practical ones. Until now, the Prosecutor acting *proprio motu* has activated fewer investigations than expected; one of the reasons for this is the economic difficulty of allocating Court's funds between the various departments, which, as we shall see, is closely linked to the United Nations and therefore this significantly reduces the investigative capacity of the Court itself. Secondly, another difficulty is represented by the complicated achievement of the evidence and witnesses necessary to start an investigation, taking into account the Court lacks of an enforcement power, therefore remaining subject to the consent and cooperation of the States that in many cases prove unwilling to provide any help.
In any case, legally speaking, the Pre-Trial Chamber must confirm that there is a reasonable basis to proceed with the investigation[208]:

> "[…]the reasonable basis standard means that there exist a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the court has been or is being committed"[209].

The Prosecutor's need of a *laissez-passer* after a preliminary examination *proprio motu* prevents a possible abuse of power by the Prosecutor himself, which was another point strongly debated during the negotiations. A balance between the power of the Prosecutor to open a preliminary investigation and the need of confirmation by the Pre-Trial Chambers in terms of subject-matter and jurisdictional admissibility seems to have been found in the final codification of article 15 of the Rome Treaty.

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[208] SCHABAS (2017:160).
[209] *Ibidem.*

1.4 UN Security Council Deferral (art.16)

Article 16 of the Rome Statute represents the other aspect of the negotiations to have unleashed many controversies together with article 13 (b) (Security Council Referral) and that still today represents one of the most debated instruments in the relationship between peace and justice. It states:

> "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter 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"[210].

Any consideration on the moral nature of such norm will be left for subsequent parts of this study, it is nonetheless, important to highlight that for both powers, to refer a case to the ICC and to defer one for security issues the Security Council must be acting under Chapter VII of the UN Charter. The interpretation here concerns the overpassing authority of the Council when referring a case for which the Court was not conferred jurisdiction upon by the States. The Security Council as a global legislator in fact diminished the effective credibility of the Court to the eyes of the international community intended as States, as recalled by Aloisi (2013) who also remarked:

> "The deferral power, in particular, was based on the need to reconcile peace and justice in situations in which the presence of peace talks or security concerns makes justice a secondary goal to the international community"[211].

The Deferral power of the Security Council was thought to be a balancing instrument between peace and justice. When mass atrocities are committed on a territory under which the Court possesses jurisdiction, directly (Rome Statute's requisites) or indirectly (Referral of the UNSC) but the process of prosecuting and punishing the perpetrators may degenerate the country into social instability and thus incur new crimes, the role of the Security Council should be the way out in the relationship between peace and justice: moreover, until now, the process of stabilising a territory has always taken precedence over the need to punish the perpetrators of serious crimes.

[210] Rome Statute, 2002; Art.16.
[211] ALOISI (2013).

2 The UN Security Council (UNSC)

2.1 Chapter V: The Security Council

The Security Council shall consist of 15 members. 5 members are permanent, China, Russia, England, France and the United States; the other 10 are non-permanent members elected for a two-year term of office. The composition, functions and powers of the Council are enshrined in Chapter V of the Charter of the United Nations from article 23 to 32.
Article 23 deals with the composition of the Council, with each member of the Council having one representative. Among the criteria for the allocation of non-permanent members, the most important is a fair geographical distribution. In addition, an outgoing non-permanent member may not immediately be re-elected[212]. The composition of the Security Council reflected the geopolitical post-war situation but it seems quite clear that the international dynamics of today make a structural change of the SC a priority on the agenda of the international community. This need for reform for what concerns the composition of the Security Council is also made urgent by the new challenges that have arisen at the global level and by the presence on the international scene of new centres of power that are asking to be represented there.

2.1.1 Functions and Powers of the Security Council

Chapter V, from article 23 to article 26, describes how the Security Council may exercise its obligation under the Charter for the promotion, the establishment and maintenance of international peace and security.
Specifically, article 24 gives "primary"[213] responsibility to protect to the Security Council in terms of threats to peace.
It is quite clear that the specification through the use of the term "primary" implies that the Security Council does not have exclusive competence in this regard but still maintain the main role in terms of control, search for solutions and prompt decision-making effectiveness for possible threats to international security.

[212] UN Charter, 1945, Art. 23.
[213] UN Charter, 1945, Art. 24(1).

2.1.2 Voting (art.27)

According to Article 27 of the Charter:

> 1. "Each member of the Security Council shall have one vote.
> 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
> 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting"[214].

All procedural matters require nine out of the 15 possible votes of the Council, all the other issues' decisions are taken by nine votes out of the 15 but including the concurrent votes of all the permanent members[215]. The Veto power of the P5 represents the most undemocratic principle of the UN Charter and the biggest limit of the United Nations as a symbol of democracy and equality among its member States. Not only the Veto power does not respect the principles enshrined in the Charter and the purposes of the organization itself but it also demonstrates that power's politics still gain against equality, human rights protection, democracy and fulfilment of collective international security. Moreover, the norm stated in paragraph 3, according to which any party involved in a dispute must abstain from voting on decisions falling under Chapter VI of the Charter and under article 52[216], has been in the past decades a very useless regulation for one main reason: the permanent members can decide whether an issue is a merely situation or whether it can be defined as a dispute depending on the possible consequences in terms of threats to the peace[217]. It has though a double-veto effect because they can decide when a certain matter can be eventually vetoed just previously defining its normative nature.

2.2 Chapter VII: Actions with Respect to the Threats of Peace, Breaches of Peace and Acts of Aggression

Chapter VII of the UN Charter represents the core function of the Security Council. It provides the framework within which the Security Council may take enforcement actions. It allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression […]"[218] and

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[214] UN Charter, 1945, Art. 27.
[215] *Ibidem.*
[216] UN Charter, 1945, Art. 27(3).
[217] Statement by the Delegations of the Four Sponsoring Governments of 7 June 7 1945, *on the Voting Procedure in the Security Council.*
[218] UN Charter, 1945, Art. 39.

to make recommendations or to resort to non-military and military actions to "maintain or restore international peace and security"[219].
Since the 1990s, more precisely since the Gulf War, the system of collective security (*i.e.* the set of powers given by Chapter VII to the Security Council) that seemed failed and utopian (we can consider it as unsuccessful until the fall of the Berlin wall and the vetoes the United States and the Soviet Union crossed each other until that period) has had a change of direction and a consequent improvement in perspective, gradually approaching the original idea wanted by the founders of the Charter. One of the main implementing elements of the Security Council when acting under Chapter VII is the intervention in the internal affairs of States, generally when it comes to human rights' violations, civil wars or serious violations.
Article 40 provides for provisional measures that are typical of Chapter VII and are generally cessation of hostilities, ceasefire or withdrawal of troops. Chronologically speaking, although these measures, by their very nature, are to be regarded as predating the measures provided for in Articles 41 and 42, they are not mandatory steps for the Council and represent exhortations to one or more States but are not binding; in any case, it should be remembered that the Council has tried to give a binding character to them that would not legally exist under the Charter. The measures that can be taken by the Council under Article 41 are coercive and falling within the definition of Article 2(7) which means that are not subject to any jurisdictional limit. The actions taken under Article 41, when implemented in cumulative form, clearly result in the isolation of the State against which the Council is acting and are binding on all the Member States of the United Nations: more precisely, these are actions decided by the Council but implemented by the Member States. The difference between these measures and those of Article 42 is that there is no military use of any kind. The Council may also adopt actions which are not specified in Article 41 provided that they fall under the domain of those actions which do not involve the use of armed forces.

2.2.1 Art.39

The assumption that there is a threat to international peace is the basis of Chapter VII and consequently of Article 39 and its determination sees the total discretion of the Security Council as its highest expression. This discretion was also the subject of extensive debate during the San Francisco Conference, during which various parties called for a greater definition of the cases in which one can speak of a threat to peace or acts of aggression (requests made mostly by medium or small States that were afraid of being targeted by the Council, the great powers could of course count on their right of veto); in any case, the final decision at the Conference was to leave huge discretional power to the Council in order to avoid delaying the proceedings.

[219] *Ibidem.*

3 The relationship between the ICC and the UNSC:

3.1 The Responsibility to Protect and UNSC Referrals to the ICC

As mentioned above, one of the mechanisms for initiating an investigation by the International Criminal Court is the referral by the Security Council acting under Chapter VII of the Charter, enabled by Article 13(b) of the Rome Statute. Situations of this kind have been throughout the life of the ICC only two: the situation in Darfur (West Sudan) and Libya.
Both will be analysed individually to highlight the importance of the Council's referral to the Court but also looking for the weaknesses of this procedure, which has led to many disputes within the international community; this is the reason why it will be also analysed the Syrian failed referral that shows once more the primacy of power's politics over criminal accountability.
If humanitarianism is today the centre of the debate in most of international forums it is thanks to the Responsibility to Protect "R2P", a doctrine developed mainly and more effectively since the 90s, which has had the ability, despite the general scepticism, to create a new international environment that provides for and unequivocally affirms the responsibility of all States to protect, not the right to intervene in the internal affairs of a State but a duty instead, precisely to protect all populations at risk of possible serious violations as we witnessed and failed in Rwanda, Bosnia and Kosovo just to name a few examples.
The Responsibility to Protect is a multidimensional concept which deals with all stages of a situation from prevention to reaction to post-crises rebuilding and comprehends those different levels of responsibility before mentioned and, above all, it is for its very nature that it recognizes the constraints as much as the opportunities for intervention and it cannot in any way be seen as a tool for the most influential countries to influence the internal affairs of a State but must be considered a necessary framework of tools aimed at avoiding horrible suffering and death to people.

3.2 The Sudanese Referral

Resolution 1593[220] by which the Council refers the situation in Darfur to the International Criminal Court is the last step in a troubled succession of recommendations by the Council to the Sudan government and the African Union. The Sudanese conflict provoked the confrontation among those supporting the process of justice and those preferring the political mediation for the transitional process of Sudan. Such situation was then replaced by a

[220] Resolution of the UN Security Council of 31 March 2005, S/RES/1593.

real manhunt: the Sudanese president accused of crimes against humanity had the freedom to travel to many African countries, demonstrating the African Union's strong critical attitude towards a Court accused of doing only Western interests in a new form of "modern colonialism". We may say that the relationship between Sudanese President Al Bashir and the International Criminal Court was a fundamental element which distinguished, in a more general sense, first and foremost the Court's relationship with the African Union in which the Court itself has overwhelmingly investigated the major number of cases; and also the relationship between peace and justice, more specifically the importance of having peace through justice. Many criticisms moved after such terrible moment for international justice even more so if we think of that the lack of cooperation on the part of local authorities, as the ICC's Prosecutor has repeatedly reiterated, should therefore have been compensated for by a stronger and more effective action on the part of the Council[221], which has essentially remained defenceless towards Sudan and the African Union, without therefore supporting the work of the Court through the instruments offered by the Charter.

3.3 The Libyan Referral

Despite the fact that Resolution 1970 of 2011 to which the Council refers the serious situation in Libya[222] is unanimously adopted, the Libyan case represents another moment of controversy for the international community, both because, as we shall see, many elements of the resolution of the situation in Darfur are repeated in this one, and because the situation in Libya is emblematic in demonstrating the Council's attempt to politicise the Court by trying to put an end to the Gaddafi's government and to begin a process of democratic transition in Libya. In the referral of the Libyan situation, adopted on 26 February 2011, the Security Council broadens the range of actions to be taken against the Gaddafi's government including an arms embargo, travel ban and asset freeze for Gaddafi and its allies[223] in the government.
At first glance, therefore, Resolution 1970 seems more comprehensive than 1593 and it probably is, taking into account that the referral to the ICC is just one of the measures taken by the Council in condemning the Libyan government. But a twofold problem arises: first, the speed with which the resolution was adopted has demonstrated the political influence that this decision has had since it came even before the International Commission of Inquiry ended its investigation in Libya to verify and provide the information necessary for an investigation to be opened by the Court.

[221] 21st Report of the Prosecutor of the International Criminal Court of 29 June 2015 to the UN Security Council, *on the Situation in Darfur*, pursuant to S/RES/1593.
[222] Resolution of the UN Security Council of 26 February 2011, S/RES/1970.
[223] Resolution of the UN Security Council of 26 February 2011, S/RES/1970.

Even more relevant to understand the influence of power politics on the independence of the judiciary is the clause in the resolution that limits the temporal jurisdiction of the Court to events occurring after 11 February 2011. Now, as we know, the Court has a temporal jurisdiction that includes all violations that occurred in a State after its ratification of the Rome Statute. But what is most surprising is that the Council, which is the body that can, by relying on Chapter VII of the UN Charter, give the broadest range of investigation and work to the Court, limits its temporal jurisdiction just from a specific moment in time on, once again representing the double face that the great western powers have when it comes to justice and political interests. Clearly, their previous collaboration with the Gaddafi's government has forced them to limit the influence of the Court so, for them, as not to fall under the eye of its investigation. Furthermore, Resolution 1970 fully reproduces paragraphs 6 and 7 of Resolution 1593, which deal respectively with immunity from the Court for all nationals of non-member countries and a ban on financing the Court from United Nations funds. As suggested by Aloisi we are talking of selective justice in its pure essence:

> "Although welcomed as an opportunity for the ICC to investigate crimes that would have otherwise remained outside its jurisdiction, the UNSC referral has *de facto* helped create the basis for the enforcement of a selective justice-one in which individuals may not be indicted, states may not cooperate, and crimes may not be investigated"[224]

What is also to be taken seriously, is the Council's habit of limiting and exploiting the Court according to the geopolitical interests of the moment, making the Court even weaker and more succulent than a body that decides how and when it is necessary to start the justice process. As in the Sudanese referral, the engine that drives the judicial machine is irremediably influenced by motivations that leave aside the mere and only criminal justice in cases of violations of the worst kind but that on the other hand include all those political and economic interests that represent the main focus of the *realpolitik* that has always characterized the international context.

3.4 The failed Syrian Referral: Chinese and Russian Vetoes

Ever since Syria blew up in mid-2011, atrocities have been perpetrated by the regime against the protesters but then, as already mentioned, it became a full scale civil war in which clearly atrocities crimes have been perpetrated by both sides. The Syrian case has been a test for the R2P doctrine because the international community was defenceless until the chemical weapons issue grew a new trigger for action to which people have been responsive, but until then the Security Council has been paralyzed and people just watched the

[224] ALOISI (2013:164).

situation going worse and worse with thousands of casualties among civilians. The Libyan precedent is a clear example in which the treatment of the government with respect to its own citizens ended with a clear, firm, robust and quick international response which was, after all, a military one. If it stayed as a pure and effective civilian protection operation, it would have been the triumph of the R2P's work and we would have seen some very clear strong signal of change for the future which would have had a significant impact in deterring what's happened in Syria. It is clear that the evolution of this crisis could have long been a threat to international peace and security since all neighbouring countries have been under pressure from the huge number of displaced people from Syria, and it is clear that the uncertainty of the Security Council in taking, promptly, some countermeasure under Chapter VII of the Charter has in some way contributed to the continuation of what has been called a humanitarian catastrophe.

The failure of the Geneva talks in 2014 led subsequently to the French draft resolution[225] sponsored by more than 60 members of the United Nations to report the serious Syrian situation to the International Criminal Court. The resolution was not approved because of the veto put forward by China and Russia, an episode that once again demonstrated the enormous supremacy of power policies and geopolitical interests over the protection of innocent people and the defence of human rights in cases of crimes of the worst kind.

The failed French draft resolution co-sponsored by more than 60 countries, as said, is the most obvious representation of the failure of the Security Council system and the ineffectiveness that, in cases of fundamental humanitarian relevance, this has demonstrated; reaffirming once again the need for a change, if not structural at least procedural, in the context of the decisions under Chapter VII of a substantial nature which provide for the possibility of the use of veto by permanent members and which in fact jeopardize one of the key principles of the Charter of the United Nations declined both in the preamble and in Article 1, namely the determination to seek peacekeeping and defend human rights universally recognized[226], underlining the prevalence of geopolitical interests that have always dominated the international spectrum and that possibly characterize anthropologically the need for man to prevail.

3.5 The judicial independence of the ICC

For the purposes of a pure criminal judicial process, the Court should have maximum freedom to initiate certain investigations. During the negotiations leading up to the Rome Statute, guarantees had to be provided so that a compromise acceptable to the majority could be reached; in this sense, the

[225] Draft Resolution of the UN Security Council of 22 May 2014, S/2014/348.
[226] UN Charter, 1945, Preamble; Art. 1.

Council's referral was seen as the key point of the whole model that the Rome Statute was about to introduce. Nevertheless, in the end what proved to be much more effective was the referral of a member State (what became the self-referral of many African States); the Council's referral instead has seen its effective use only twice, demonstrating that in cases of serious violations the Court is not endowed with sufficient freedom of action, but that in cases outside its jurisdiction, which I believe to be its main weakness, it must refer to the decisions of the Council, a body of an executive nature that is moved on the basis of geopolitical reasons that reduces the value of criminal responsibility and jeopardize the process of justice for which the Court was created. The most spontaneous doubt that arises from this is to think that the inefficiency to which the Court has often had to submit may ultimately lead to its total disuse, in fact it does not have universal jurisdiction despite the acknowledged universality of the crimes it pursues, it does not have an instrument for enforcing its decisions and still maintains several budget problems that do not allow it to fully achieve its objectives.

3.5.1 International Criminal Law and Universal Jurisdiction

For what concerns the universal jurisdiction I refer to the definition given by Bassiouni according to which:

> "The theory of universal jurisdiction is extraneous to the concept of national sovereignty, which is the historical basis for national criminal jurisdiction. Universal jurisdiction transcends national sovereignty"[227]

This definition is clearly a value-based definition which has also been supported by various international organizations, it moves away from any accusation of being oriented by western values as it substantially detaches itself from any socio-cultural characteristic to define precisely a jurisdiction that is legitimized by the commission of crimes universally recognized as among the most serious and avoiding any approach to national-based interests of any kind.
In any case we may recall that still today there is not a shared definition commonly accepted of universal jurisdiction nor in conventional neither in customary international law[228]. What is commonly shared is the list of crimes that may belong to such jurisdiction, in better words, there is a common opinion on the substantive scope of the universal jurisdiction and we may

[227] BASSIOUNI (2001:96).
[228] Dissenting Opinion of Judge Van den Wyngaert of the ICJ of 14 February 2002, *on the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, para 44.

recall the Expert Report that in 2009 has included in this category the crimes of torture, genocide, crimes against humanity, war crimes and piracy[229].
This study supports the idea that a universal jurisdiction would be of fundamental importance to the International Criminal Court. First of all, as a deterrent for possible future crimes, as a lack of geographical limits would make the work of the Court more legitimate and effective as well as easier in the eyes of possible perpetrators. Secondly, morally speaking, it seems logical to suppose that an international court whose task is to punish crimes considered of a universal nature, which are universally recognised as such regardless of the nationality of the victim or of the aggressor or the possible place where the crime takes place, should be equipped with a jurisdiction capable of dealing with the whole spectrum of possible crimes without territorial limitations: once again the definition of Bassiouni[230] seems correct as it may not include any collision between such jurisdiction and national interests.
Thirdly, it is precisely because of the jurisdictional aspects that the Court, 18 years after its entry into the international arena, has encountered the greatest number of problems: it seems clear, therefore, that this is the direction towards which we must work in order to find a compromise that will allow the Court to exercise its work smoothly and avoid any kind of recrimination based on national sovereignty.

3.5.2 Positive Complementarity

By virtue of this prerogative *i.e.* to give the possibility of achieving justice at national level, an alternative that has developed since the inauguration of the Prosecutor Luis Moreno Ocampo, who was the first to introduce its potential, is the positive complementarity. The idea is to give greater support, in a way, to the judicial capacities of national institutions clearly in cases where they have obvious and prohibitive shortcomings. The positive complementarity can be a policy of the Office of the Prosecutor that

> "would actively encourage investigation and prosecution of international crimes within the Court's jurisdiction by States where there is reason to believe that such States may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offers a resource-effective means of ending impunity"[231].

In this study is supported the idea of improving the possibilities of triggering the ICC's jurisdiction for the only purpose of at least reducing impunity

[229] Report of the Council of the European Union of 16 April 2009, *on the AU-EU Expert Report on the Principle of Universal Jurisdiction*, 8627/1/09 REV 1.
[230] See note 141.
[231] BURKE-WHITE (2008:62).

throughout the world, if the positive allows the whole system to earn in terms of efficacy and clearness it may be desired and sought after beyond any reasonable doubt. The former Prosecutor Moreno Ocampo when taking office and talking of positive complementarity expressed its optimistic understanding of the consequences of a positive complementarity thanks to which the number of cases should not value the efficiency of the Court, on the contrary the absence of trials before the ICC due to the regular functioning of national institutions, would be a major success.

4 Between Positive Law and Customary Law: Lawful or contradictory decisions?

4.1 The UN Security Council powers in the Rome Statute

The alleged de-legitimization of the Court in the eyes of the international community, therefore, has seen as the main cause the actions and decisions that the Security Council has taken in crisis' situations and that have caused quite a few controversies both from a moral and substantial point of view.
In the negotiations that preceded the Rome Conference, the referral of the Council, then made explicit in Article 13(b), was considered from the outset as a necessary rule for a more correct and complete functioning of the Court and its jurisdiction. Over the years, however, it is precisely the referral of the Council and the possible deferral (which was seen as a supervisor clause for the Council which thought to act as a "watchdog"), enlisted in article 16, that has given rise to criticism of the Court and also of the Council itself, which has also been accused of using the Court as a tool for a new form of western colonialism; mainly the African Union has raised such criticisms, feeling as sacrificial victim of the legal neo-colonialism of the great western powers. The powers of the Council to extend the jurisdiction of the Court or to block its investigations have, however, had to contend with problems within the Council itself, which saw the great powers expressing their views differently on situations that needed rapid, decisive action and a united position of the Council, which was often paralysed by the exercise of the veto's power due exactly to its internal divisions. We may then summarize that the Security Council showed a double-faced attitude towards the ICC: on the one hand supporting it and reaffirming its importance, but on the other limiting its effectiveness by introducing some clauses in the resolutions for the referrals that economically complicated its actions and judicially limited its jurisdiction from politically motivated decisions.

4.2 UNSC Referral power (art.13b): between theory and practice

The Security Council's power to refer to the International Criminal Court is enshrined in article 13(b) of the Rome Statute. This mechanism that triggers the Court's jurisdiction opens to the Prosecutor the possibility and the duty to investigate possible international crimes; in this sense, it does not matter where the crime is committed or by whom because of the strict normative connection between the Rome Statute and the UN Charter that allows the Security Council to expand the ICC's jurisdiction in terms of *ratione personae* and *ratione loci*. Article 25 of the UN Charter states: "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"[232]. It is consequential that when the Security Council acts according to article 13(b) of the Rome Statute, referring a situation to the ICC, the Court is legally legitimized by the UN Charter to exercise its jurisdiction and to address international crimes, and States are bound to cooperate with it regardless their membership to the Rome Statute but because their commitment to the United Nations. The duty to reinforce such cooperation in cases where States appear to be regretful still remains in the hands of the Security Council that has a spectrum of possible measures to take in order to achieve such cooperation by countries that show mistrust and hostility towards the Court. It is in the interest of criminal accountability that the possibilities within the reach of the Security Council may be employed at the expenses of political partisan interests of the Council itself. What more, the legitimization of the Council and the Court to address international crimes is reinforced by article 103 of the UN Charter in which is described the primacy of the obligations agreed under the UN Charter with respect to any other international agreement[233]. The spectrum of measures at the hand of the Security Council to ensure cooperation by States has been a resource the Council has almost never exercised and for which has received many criticisms by the international community. While a State may not be a member of the Court, it will almost certainly be a member of the United Nations, that means it has ratified the Charter, which means it is therefore subject to compliance with its articles, including article 25, according to which Member States are obliged to accept and respect the decisions of the Security Council[234], which in this case would have entrusted an external and independent judicial body with the task of prosecuting international crimes. There is therefore no doubt as to the importance of Article 13(b) to the scope of international criminal justice and the need for this article to be reaffirmed in the normative structure of the International Criminal Court. It is also clear, on the other hand, that the only instrument for this normative structure to be respected in practice is at the discretion of the Council itself, which has the

[232] UN Charter, 1945, Art. 25.
[233] UN Charter, 1945, Art. 103.
[234] UN Charter, 1945, Art.25.

moral obligation and, at the same time, the legal basis[235] to take all the necessary measures provided for in the Charter to ensure the level of enforcement that the ICC lacks. In this aspect we can talk of complementarity between the Court and the Council, the former needing the latter in expanding its jurisdiction when necessary and in enforcing different measures for the fulfilment of its decisions. If all this in theory represents an adequately structured normative context that includes a form of universal jurisdiction that seems to be the logical counterpart for the task that the International Criminal Court possesses, on the other hand it has been shown that this structure is in reality a victim of reasoning that goes beyond pure criminal justice and that has subjected the Court to the world of politics by influencing its action and limiting its effectiveness. The case of the failed Syrian referral, fully represents this criticism that many scholars have raised against the Council, which has been accused of maintaining a double standard position in defence of the specific interests of its permanent members; the veto exercised by Russia and China showed how the interests that these two countries tried to defend in the Syrian's context acted at the expense of criminal justice and, above all, once again called for changes to a system that needs a fairer filter in the situations to be reported to the Court and the spectrum of action of the Court in the international arena. If the Council is to put aside the political interests of its permanent members the possibility to maintain a structured normative framework around the International Criminal Court would be strong, on the other hand if the Council is to be subject to its internal division, guided by different geopolitical interests of the major powers, the Court will remain a judiciary only potentially effective. In this context, it is believed here that a revision of the structure of the Security Council is needed in light of the modern challenges the international community is facing.

4.3 The Deferral mechanism (art.16): different *rationales*

The deferral by the Security Council is another of those rules which has been and continues to be the focus of attention of the international community and which has received the most relevant criticism.
Many scholars consider that the importance of defining the barriers that circumscribe the use of deferral by the Council is aimed at dealing with situations of conflict between peace and justice. The use of Article 16 in Resolutions 1422 of July 2002 and 1487 of June 2003 has shown that the Council exercised such power for other reasons, that it has a discretionary power that cannot be controlled and that there is a need for a better structuring of the rules which have to do with international criminal justice in the normative process of the ICC. Over the years, especially African States have drawn attention to the Council's power of deferral, including the African

[235] Relationship Agreement between the International Criminal Court and the United Nations, 04 October 2004, Art. 17(3); Rome Statute, 2002, Art. 87 (5,7).

Union itself in 2008 calling for this article to be invoked to suspend the trial of Sudanese President Al-Bashir: the request was unsuccessful. Again in 2013, another request for suspension under Article 16 was made by African States in favour of the newly elected Kenyan President and Vice-President Uhuru Keniatta and William Ruto. Both requests, after being discussed in the Council, were rejected with great indignation of Africans, who claimed that regional peacekeeping had been set aside in the face of pure political intent.
In the final analysis, it seems reasonable to suppose that the Council should act on a case-by-case basis and that the suspension should therefore be specific and aimed at concrete investigations, thus avoiding the creation of disputes by precluding categories of persons (as the case for Resolutions 1422 and 1487) and/or categories of crimes from being brought before the Court. Furthermore, the validity of the suspension under Article 16 should not apply to upcoming situations, crimes not yet committed and defendants not yet charged. The only thing that seems to be certain is the variety with which the issue of deferral by the Council has been dealt with, in which even the different members maintaining a temporary sit within the Council have identified several reasons why a deferral would appear to be justified or not. At least four different *rationales* seem to have found support as well described by Knottnerus and which he calls preventive, responsive, instrumental and of last resort[236]. As we have seen, therefore, the main controversy over Article 16 of the Rome Statute, which describe the deferral by the Security Council, is an interpretative and not a structural one. The question, therefore, does not concern the scope of the suspension of the investigation or prosecution, which, as we have analysed, does not include all the secondary elements, but rather the problem lies in the interpretation to be given to the article, that is, when the Council can invoke it. In this study, the preferential hypothesis, first of all, provides for a review of the decision-making processes in the Council in international peace and security matters, which then, with regard to the Court, would be reflected in a more legitimate interpretation and which should require the intervention of the deferral in cases of clear and highlighted threat to international peace and which would otherwise have no other peaceful and democratic solution to a hypothetical conflict.

4.4 The future of the International Criminal Court

The accession to the Rome Statute, the founding treaty of the ICC, has almost come to a halt. As time goes by, tensions between African States and western States intensify sharply. The loss of the Court's legitimacy is plain for all to see. Bearing in mind that the mechanisms of justice, including criminal trials, only work when they are legitimate, it is clear that in the case of the ICC,

[236] KNOTTNERUS (2014:216).

justice is neither recognized nor accepted, and the exercise becomes pointless. This constant reduction in legitimacy can also be justified by a varied interpretation of justice. Many studies have shown that there are differences between different populations with regard to the concept of justice but also within the same community: moreover, this idea is even stronger when it comes to specific events that are judged differently according to the level of involvement. Some scholar considers much more useful to accept the critiques of a political motivated body in order to achieve a better understanding of the world dynamics and to strengthen the instruments at the disposal of the Court to act more effectively; the Court may then accept the critiques that are moved against it and openly discuss them to show openness and transparency of intents as recalled by De Hoon:

> " […] By ignoring and denying such critique, it is not only not going away, the Court in fact counterproductively allows its opponents to mobilize the justified and constructive critique for the anti-ICC camp. It is time to change that course […]"[237]

The importance of so-called transitional justice is beyond doubt and the set of mechanisms that characterise it complement each other in carrying out the deterrent or preventive, restorative, judicial and retributive functions that they perform; the problem lies in the fact that a top-down Court such as the ICC evidently does not respond in a concomitant and comprehensive manner to the expectations that the victims as well as the international community, at different levels, place in it. Contemporary international criminal justice has generated a field of law that is rationalized around the idea that both the individual and humanity as a whole need protection by the legal system; to this end, an attempt has been made to break the assumptions and structures of an international legal system that is built predominantly around the consent of the State which in most cases maintains a strong reluctance against a supranational authority. I believe that by structurally modifying the relationship with the Security Council and thus avoiding a political influence, at least as evident as today, and then reconceptualising the objectives of the Court in materialistic terms for the victims and trying to resolve the jurisdictional and enforcement limits that the Court faces on a daily basis, we can really establish a mechanism of criminal responsibility that is first a strong deterrent and then a retributive instrument. The key element, at the basis of any reasoning in this field, is the will of the States which remains the first breaking point in any discussion of international criminal justice. The relationship with the Security Council is still today, for the present author, the biggest challenge for the International Criminal Court in terms of independence and legitimacy. Such relationship must be revised to a more integrated model which may give much more discretion to the ICC when assessing criminal accountability; I consider necessary another elaboration of the deferral power of the SC which should be filtered taking out from the

[237] De Hoon (2017:611).

Council the discretion it enjoys in deferring cases to the Court according to political motivated and in any case discretional reasons. The referral power under article 13 (b) could be called into question by the voting mechanism in the Council, which can remain deadlocked through the power of veto; in this sense, the majority of the permanent members of the Security Council must choose on which side to step. 3 out of 5 did not ratified the Rome Statute but it is thanks to them whether a referral to the ICC is adopted or not: a relevant weakness of the entire system which influences the authority of the Prosecutor and make the Rome Statute system as a whole just as western-oriented as many other international institutions are accused to be.

4.5 Proposal for an Independent Expert Review of the ICC

The life of the International Criminal Court has been characterized by a strong innovative process of the international judicial system's potential, but it certainly leaves controversies due to an evident procedural and jurisdictional deficiency that does not allow an effective and complete action. It is at the basis of this principle that on 7 May 2019 the Presidency of the Court and the President of the Assembly of State Parties met and discussed the proposal of an Independent Expert Review (also "IER") of the Court's performance and more generally of the Rome Statute's system. They then sought to identify possible areas of analysis for a review of certain elements in the structure of the international criminal law mechanism in order to remedy its weaknesses and improve its positive aspects. An in-depth review of the mechanisms beyond the work of the International Criminal Court is necessary for the restructuring, where needed, of the procedures of the ICC. It is indeed a good practice already successfully applied to other international tribunals such as the ICTY, ICTR[238], SCSL[239] and ECHR[240]. It is a great opportunity for the ICC to improve its effectiveness and to achieve more international credibility through a review based on objectiveness, independence, openness, transparency and inclusiveness. Such task is characterized by the assessment of a Panel composed only by experts of international criminal law and with a high degree of experience in this field to conduct an investigation and to maintain a discussion with all the relevant
stakeholders as well as all the organs of the Court and officials, the States Parties and civil society organizations. During the 9th Plenary Meeting of the 6 December 2019 the Assembly of States Parties adopted by consensus Resolution 7 on the Review of the International Criminal Court and the Rome

[238] Report of the Expert Group of 22 November 1999, on *Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, A/54/634.
[239] Report of the Independent Expert Antonio Cassese of 22 December 2006, *on the Report on the Special Court for Sierra Leone*.
[240] Report of the Right Honourable the Lord Woolf of December 2005, *on the Working Methods of the European Court of Human Rights*.

Statute's system[241], which finally paved the way for the Panel to begin work from 1 January 2020. Such resolution defined the points on which to base the work of the experts which were noted for the Panel, mainly based on three macro areas of the Court: governance, judiciary, investigations and prosecutions[242]. The final report shall be submitted for September 2020 to the Bureau and the Assembly of States Parties[243]. The mandate for the Independent Expert Review is to strengthen the overall functioning of the Court and the Rome Statute system to achieve a stronger effectiveness of its work and its legitimacy in the eyes of the international community thanks to a thorough review of a technical nature of processes, procedures, practices, and the organization of and framework for the Court's operations while upholding the key principles of the entire system namely the integrity, complementarity, judicial and prosecutorial independence of the Court[244].

4.5 Final Considerations

This analysis has attempted to demonstrate, on the one hand, the importance that the International Criminal Court has had and is having in terms of international criminal accountability, proposing itself as an important representative of its *ad hoc* predecessors; on the other hand, it seems clear that there is a need for a renewal of some aspects of the normative model and the system of the Rome Statute.

It is necessary to support a greater discretion and independence of the Court from the political decisions of the Council, especially taking into account the imbalance that characterizes the members of the Council with their respective non-ratification of the Rome Statute (U.S., Russia and China).

The international community will need to make greater efforts to try to influence these major powers, which must necessarily ratify the Rome Statute if they are to demonstrate once and for all their commitment to the protection of human rights. A second enormous problem that the Court cannot ignore are the jurisdictional limits within which it must comply with its mandate; it is necessary to distance the extension of its jurisdiction from the Council's referral in order to give a strong deterrent signal and to achieve that legitimacy the Court needs so much; the same legitimacy that the Council itself is losing, probably because it is the founder of a geopolitical model that no longer represents international balances and dynamics in any way.

How can the international community deliver a universal jurisdiction to the ICC is a question still without a proper answer; the difficulties are many, from the reluctance of States to lose more national's power and to be more subject

[241] Resolution of the Assembly of States Parties of the ICC of 06 December 2019, ICC-ASP/18/Res.7.
[242] *Ibidem.*
[243] *Ibidem.*
[244] *Ibidem.*

to the ICC to the problematic mechanism with which to regulate such universality. In such contest, the present author considers the General Assembly of the United Nations a fundamental actor in the renewal process because it better represents the international community as a whole. Such representation would be more legitimate and the decisions within the GA may be more problematic due to the high degree of State's representation but at the same time more legitimate and surely such decisions would concretely be supported by member States. Such organ of the UN can also play a part in the renewal of the Security Council decision-making process that after decades of useful cooperation and balance of power, today is being challenged by a multilateralism that does not envision the prerogatives of its permanent members, which in any case according to the Charter may accept such renewal. Those relevant challenges will be the key assessments for the long-term stability of the International Criminal Court and its legitimization in front of the international community which, in part, is strongly critical against its work. It is undeniable, anyway, the fundamental role the ICC can play in the next decades in making those responsible of serious human right's violations, to be held accountable, making justice for peace's stabilization processes.