1. Introduction

1.1 SETTING THE SCENE

The United Nations Security Council (SC) referral to the International Criminal Court (ICC) is arguably the most fundamental operational relationship between the United Nations (UN) and the ICC.\(^1\) It allows the Court to exercise jurisdiction over situations in states not parties to the Rome Statute of the ICC\(^2\) (the Statute, Rome Statute) provided for in art 13(b) of the Statute.\(^3\) In contrast to referrals by states parties (art 14) or the Prosecutor acting \textit{proprio motu} (art 15), where jurisdiction is conferred to the ICC through the ratification of the Rome Statute,\(^4\) the SC referral would confer jurisdiction to the ICC over situations which it otherwise could not lawfully exercise.\(^5\)


\(^4\) Article 1 Rome Statute provides that ‘[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute’. Pursuant to art 12(1) Rome Statute provides ‘A State which becomes a party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Art. 5’.

\(^5\) Note that the ICC (with the exception of the SC referral) only has jurisdiction over offences committed when a state that has nationality or territorial jurisdiction over the offence is a state party to the Rome Statute (see art 12 Rome Statute); see also Jennifer
Its inclusion proved to be one of the most contentious issues during the preparatory work as well as at the conference in Rome. Legal issues were raised, particularly regarding the power of the SC to refer a situation involving a state not party to the ICC. In fact, when the proposed Statute for the ICC was put to a vote at the end of the negotiations in Rome on 17 July 1998, the Head of the Indian delegation, Dilip Lahiri, issued a statement explaining the rejection of the Statute by India. He delivered ruthless criticism of the final draft and pointed out that

it was odd, for instance, that the draft adopted a definition of crimes against humanity with which the representatives of over half of humanity did not agree. And we are now about to adopt a Statute to which the Governments who represent two-thirds of humanity would not be a party.

He criticized the fact that, in his view, ‘the Statute gives to the Security Council a role in terms that violate international law’ because

[t]he power to bind non-States Parties to any international treaty is not a power given to the Council by the Charter. Under the Law of Treaties, no state can be forced to accede to a treaty or be bound by the provisions of a treaty it has not accepted . . . Why wait now for signature and ratificating [sic]? The permanent members of the Security Council could have got together with the like-minded and cobbled together a Statute with which the rest of the world in any case has no option but to comply if the Security Council, acting under Chapter VII, demands it.6

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6 Dilip Lahiri, ‘Explanation of Vote by Mr. Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the International Criminal Court’ (17 July 1998).

And while the Rome Statute was eventually adopted by 120 votes in favour and only 7 votes against (with 21 states abstaining), questions with respect to the legal nature and the legal justification for such SC referral remained unresolved. Aside from art 13(b), the Rome Statute does not include any detailed provision on this referral mechanism. A discussion regarding the referral’s legal nature did not take place. One of the reasons for the lack of such debate is that the legal justification for such referral powers of the SC were simply assumed to exist due to its political expedience and feasibility. This widespread understanding is exemplified by the fact that the referral power was also supported in the name of the ICC acting as a permanent version of the ad hoc tribunals. The power of the SC to establish ad hoc tribunals was being challenged at the time. But their legality was later confirmed in the Appeals Chamber’s judgment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Tadic* and has not been seriously contested since.

However, as this study will demonstrate, essential differences exist between the confirmed legality of the establishment of ad hoc tribunals and the questions regarding the legality of SC referrals involving situations in the territory of states not parties to the Rome Statute. These differences bring to bear the fact that the legal nature of SC referrals cannot be equated to that of the establishment of the ad hoc tribunals. Hence the need for a detailed analysis of the SC referral mechanism.

These issues are not merely an academic exercise but are important for answering the legal questions raised by the SC referral practice, especially due to the ambiguous SC Res 1593 (2005) and Res 1970 (2011) in which the SC...
referred the situations concerning Darfur and Libya respectively to the ICC. Question arise, for instance, whether and what legal effects the jurisdictional exemption for certain categories of nationals of states not parties to the ICC has, or whether or not personal immunities under customary international law still apply. Other issues include whether the SC referral can refer situations retroactively or only prospectively, and with what if any temporal limitations. Indeed, it will be demonstrated that a firm theoretical foundation of the legal nature of SC referrals is essential for the analysis of the operation and exercise of the ICC’s jurisdiction and powers to answer these and other questions.

To that end, I proceed by first introducing the hypotheses of this study and describing the analytical and methodological framework as well as the terminology adopted. Next, Chapter 2 examines the legislative history of the SC referral as included in the Rome Statute of the ICC to bring to bear the inherent contradictions and unresolved issues surrounding its legal basis and conceptualization under international law. Against this historical backdrop, Chapter 3 analyzes the legal nature of the SC referral, arguing that it constitutes a conferment of powers from the SC to the ICC. On this basis, the powers of the SC under the UN Charter are analyzed in Chapter 4 to establish potential limits to SC referrals and their conditions. Chapter 5 then addresses the legal consequences for the ICC acting on the SC referral, followed by Chapter 6 which introduces the actual practice of the SC and Chapter 7 which applies the findings of this study to the key issues raised by it. Finally, Chapter 8 concludes by evaluating the findings of this study and assessing the usefulness of considering the ICC a Janus-faced institution.

It is important to note that this study is only concerned with the SC referral and the resulting exercise of criminal jurisdiction by the ICC over a situation in the territory of a state which is neither a party to the Rome Statute nor otherwise consenting to this exercise of jurisdiction.

1.2 HYPOTHESES

This study focuses on the relationship between the SC and the ICC, as others have already done in detail.13 The present inquiry is distinct from previous

13 Jakob Pichon, Internationaler Strafgerichtshof und Sicherheitsrat der Vereinten Nationen: Zur Rolle des Sicherheitsrats bei der Verfolgung völkerrechtlicher Verbrechen durch den ISTGH (Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V 2011); Robert Frau, Das Verhältnis zwischen dem ständigen Internationalen Strafgerichtshof und dem Sicherheitsrat der Vereinten Nationen: Art. 13 lit. b) ISTGH-Statut und der Darfur-Konflikt vor dem Gerichtshof (Schriften zum Völkerrecht Band 192, Duncker & Humblot 2010); Michael E. Kurth, Das Verhältnis des Internationalen Strafgerichtshofes zum UN-Sicherheitsrat: Unter besonderer
accounts of this relationship in that it exclusively deals with the legal nature of SC referrals to the ICC involving non-party states to present a comprehensive legal analysis of the SC’s referral practice. In doing so, this study provides a more detailed account of the legal nature of such referrals in the context of non-party states from the law of international organizations.

Against this background the following hypotheses have directed this study. The first working hypothesis was that by applying the law of international organizations to the institutional relationship between the SC and the ICC, important solutions are provided to the normative problems arising out of the SC’s practice.

Second, this study puts forward the hypothesis that the legislative history of the SC referral reveals the inherent contradictions and paradoxes of the Rome Statute and that this proves the continuation of a double standard applied in international criminal law, in which powerful states subject other, weaker states to the jurisdiction of an international tribunal, but are not willing to subject themselves to such jurisdiction. The SC referral is the legal epitome of this reality.

Third, at the core of this study is the hypothesis that the legal nature of the SC referral is significantly different from the precedents set by the establishment of the ad hoc tribunals (ICTY and International Criminal Tribunal for Rwanda (ICTR)). This is the reason why I carefully analyze the legal differences between the SC referral and the creation of the ad hoc tribunals.

Fourth, I hypothesize that while it is not unbound by law, the SC enjoys broad discretionary powers and it is not easy to establish binding limits to SC measures under Chapter VII.

Finally, the last hypothesis that this study wishes to validate is the fact that the ICC is bound by the jurisdictional exemptions included in the SC referrals since the ICC is not authorized to exercise jurisdiction over situations in non-party states that goes beyond the conferred jurisdictional authority as included in the SC referral.

1.3 ANALYTICAL APPROACH AND METHODOLOGY

The analytical approach and methodology of this study can be defined in terms of what literature and theory it primarily analyzes, uses and employs, what
emphasis it puts on the value of court decisions for the determination of rules of international law, as well as the author’s normative commitment.

First, this study uses a broad literature base. It is important to note that it not only consults ‘mainstream’ international criminal law (ICL) scholarship but also ties in the arguably nascent critical scholarship of ICL. Still, this study confines itself to the legal analysis of the issues at hand and can therefore not be considered critical legal scholarship in the sense of critical legal studies. Most importantly, however, this study departs from current accounts of ICL in that it analyzes the institutional relationship between the SC and the ICC from the perspective of the law of international organizations.

Second, as regards the legal nature of the SC referral, this study is primarily based on the theory of conferral of powers. This theory has been successful in the analysis of the delegation of Chapter VII powers of the SC to UN member states, regional arrangements, subsidiary organs and the UN Secretary-General.14

Third, the author’s normative commitment is to realism, which describes a concern with what actually is.15 As Sarah Nouwen puts it:

This is a realism that acknowledges the importance of big ideas and great ideals, but believes that they should start from what a matter of fact is, for them not to become dangerous; a realism that is idealistic precisely because it works towards ideals from a difficult status quo, as opposed to an idealism that proceeds on the basis of assumptions that do not reflect reality.16


16 Ibid. [emphasis in the original]. It must be noted in this respect that particularly in the field of international criminal law, it is important not to confuse the law as it is, with a concept of justice, i.e. a (subjective) conviction of what the law should be. This has been pointed out by Koskenniemi, who stated that “[t]he dilemma of rules and standards undermines the ability of the mode of control to establish behavioural hierarchies by reference to the “lawful”/“illegal” scheme. It pits “law” against “justice” in a fashion that reverses the hierarchy between the two. We can no longer assume that we find social justice by applying the law. We now seem able to find the law only by applying justice. This, however, seems fatal to the legal project altogether. We have recourse to law in the control of social behaviour precisely to avoid reference to principles of justice that we assume to be subjective, undemonstrable [sic] and open to misuse by those in power. If now we are required to know justice before we can know the law, then we must either give up the ideal of control or assume that justice is not so subjective and undemonstrable [sic] after all. Though more appealing, the latter alternative, however, deprives the point in knowing the law: we are already able to set up the perfect
An example of implications of the realist commitment adopted in this study is the analysis of the powers of the SC. Realism in this sense views much of the writing about the actions of the SC, which asserts that many such actions are ultra vires, beyond its powers under the Charter, or otherwise unlawful, as rather unconvincing. Upon close examination, this part of the literature is neither based on state practice nor on the practice of the organs of the UN, nor on decisions of courts and tribunals.17

1.4 TERMINOLOGY

The ICC is collectively identified in art 1 of the Rome Statute as ‘the Court’ encompassing all its organs enumerated in art 34 (the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division, the Office of the Prosecutor, the Registry), along with the Assembly of States Parties (art 112). The word ‘Court’ is used throughout the Statute as signifying the vestee of judicial, prosecutorial or administrative functions of the ICC.18 Without any specific mention of certain organs of the ICC, this study uses the term ‘ICC’ in reference to the ICC as the international organization established by its constituent treaty, i.e. the Rome Statute of the ICC.19

1.5 THE ICC AS AN INTERNATIONAL ORGANIZATION

The argument presented here is based on the classification of the ICC as an international organization with international legal personality distinct from its member states. The general criteria for the determination of an entity as being an international organization under international law do not appear to pose any problems. It is established through a multilateral treaty between sovereign states, is equipped with organs, and its legal powers and purpose are distinguished from those of its members.20 However, treating international
courts as international organizations may be ‘awkward’. Nevertheless, the ICC is the ‘overt’ example, since it must be understood as being governed by an Assembly of States Parties.

Regarding the related question of international legal personality of the ICC, two main theories have emerged as to how international organizations acquire international legal personality. First, the so-called will theory sees the intent of the contracting parties as being determinant for international legal personality. This intent may be expressly established, or inferred from the constituent instrument containing no specific provision. Following the will theory, the intention of the founders of the organization decides the organization’s legal personality. Article 4 of the Rome Statute sets out the legal status and powers of the court, according to which ‘[t]he Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes’. Accordingly, the express reference in art 4 establishes the international legal personality of the ICC. The problem with this view is, however, that art 4 cannot legally bind third states: for them art 4 is res inter alios acta.

On the other hand, under the objective theory of personality, legal personality is established once it exists as a matter of law, i.e. meeting the legal requirement of international law for ‘organizationhood’. It is therefore a factual, objective question and not the provisions of the constitution or the intention of its framers which establishes the international personality of an international organization. As a main requirement, the organization must possess a volonté distinctive or ‘distinct will of its own’. It must be a ‘collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member-States’.

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22 Ibid.
23 Gazzini (n 20) 34.
24 Ibid.
26 Danilenko G. M., ‘ICC Statute and Third States’ in Cassese (n 8) 1873; see generally Gazzini (n 20) 35.
27 Klabbers (n 25) 48–49.
28 Finn Seyersted, ‘Objective International Personality of Intergovernmental Organizations’ (1964) 34 Nordisk Tidsskrift for International Ret 1, 39–40.
The ICC fulfils these requirements of organizationhood for the following reasons. First, the ICC is established by the Rome Statute, which is an international treaty. Second, the Rome Statute is the constitution of the ICC in that it confers and governs the powers of the various organs of the ICC. These organs are the Assembly of States Parties (art 112), the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division; The Office of the Prosecutor; and The Registry (art 34). It has international legal personality distinct from that of its member states (art 4(1)). And it concluded the Relationship Agreement (RA) with the UN and other agreements with states (for example, the host state agreement with the Netherlands).30 In conclusion, the ICC is an international organization.31

Organization’ in its draft articles on the responsibility of international organizations as ‘an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.’ See art 2 of ILC, ‘Draft Articles on the Responsibility of International Organizations’ 2011, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, para 87). For a discussion of this definition and an overview of the other authoritative definitions adopted in the literature see e.g. Stephen Bouwhuis, ‘The International Law Commission’s Definition of International Organizations’ (2012) 9(2) International Organizations Law Review 451.

31 See also Alain Pellet, ‘Applicable Law’ in Cassese (n 8) 1053.