

REFERRING CASES TO THE ICC: UNSC VS. UNGA POWERS

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OVERVIEW OF THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) is an international court separate from the United Nations (UN) and its judicial body, the International Court of Justice (ICJ). The ICC was created by the Rome Statute in 1998 and became operational in 2002. It hears cases specifically related to the international crimes of genocide, war crimes, crimes against humanity, and the crime of aggression. The ICC is meant to be a “court of last resort” which means that it does not replace domestic courts, but rather, provides a complementary forum for these cases to be heard when States are either unable or unwilling to proceed with them. Even though the ICC is independent and is not a UN body or organization, the ICC and the UN do have a relationship which is provided for by Article 2 of the Rome Statute, the UN-ICC Relationship Agreement, and General Assembly resolution 58/318 in A/58/874 + Add. 1



HOW TO REFER A CASE TO THE ICC

The ICC can investigate a potential crime upon referral from a State Party—a state that has signed and ratified the Rome Statute—or upon referral from the UN Security Council (UNSC). Cases that are referred to the ICC by the UNSC, may involve any UN State member, even if it has not signed and ratified the Rome Statute. This is provided for in Article 13(b) of the Statute, and also in Chapter VII of the UN Charter. The Prosecutor of the ICC, however, can also initiate an investigation on their own if they receive permission from the Judges of the Pre-Trial Chamber.

The ICC cannot investigate crimes that took place before its inception as an international organization—before July 1st, 2002. This means that the ICC’s jurisdiction is “non-retroactive.” The ICC has jurisdiction over all State Parties, although a State not party to the Statute may choose to accept the ICC’s jurisdiction. It should be noted that the UN General Assembly (UNGA) cannot refer a case to the ICC. This means that, legally, the UNGA does not have any power when it comes to bringing perpetrators of serious international crimes to justice through the ICC. The UNGA must rely on either the UNSC or on individual states to refer a case to the ICC.

This becomes problematic, however, when a state within the UNSC vetoes an ICC referral. This was the case, for example, when Russia vetoed a referral to the ICC for the Malaysia Airlines Flight MH17 disaster. Such a veto by a UNSC party can also affect the willingness of individual states to refer a case to the ICC because of the politics involved in doing so; states may not be willing to take on that burden outside of the UN scheme for fear of retaliation. It therefore appears that, in the face of a UNSC veto, the UNGA has no power to bring justice to those affected by serious international crimes.

Potential solutions against the UNGA's referral limitations

One possible strategy the UNGA has for seeking justice against perpetrators of serious international crimes, however, is to invoke the Uniting for Peace (U4P) resolution to establish an ad hoc tribunal.

The UNGA can use the U4P mechanism when it concludes that the UNSC has failed in its mission to maintain peace and security. Denying justice to a group of people who were harmed by serious international crimes, and therefore preventing reparations and healing, may qualify as failing to maintain peace and security. Furthermore, allowing an alleged perpetrator of serious international crimes to go free puts people at risk of being harmed by them again and therefore maintains a risk of conflict. This may therefore justify a UNGA use of the U4P resolution to create an ad hoc tribunal.

An ad hoc tribunal is a court of justice constructed solely for the purpose of handling cases arising from a particular conflict or situation, such as the International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Tribunal for the Former Yugoslavia (ICTY). Instead of referring numerous cases to the ICC to try perpetrators of international crimes carried out during either of those two conflicts, the UNSC created ad hoc tribunals, separate from the ICC, to focus specifically on crimes committed during those conflicts.

Although in those two circumstances the tribunals were created by the UNSC, that is not the only way to create them: they can also be established by treaties, domestic law, and by the UNGA. Should the UNSC veto a case referral to the ICC, the UNGA still has this legal tool to circumvent the blockage. Using the U4P resolution to create an ad hoc tribunal would allow the UNGA to take action where the UNSC has vetoed a referral.

There are, however, potential limitations to a UNGA-created ad hoc tribunal. Although Article 22 of the UN Charter states that the UNGA "may establish such subsidiary organs as it deems necessary for the performance of its functions," some argue that the Assembly's functions do not include the ability to create such judicial bodies. However, a counter to this argument is that the U4P mechanism gives the UNGA a broad scope of powers when (1) there is a lack of unanimity within the UNSC, and (2) the UNSC has failed in its responsibility to maintain peace and security. On this interpretation, the UNGA has in its broad powers the ability to create an ad hoc tribunal when invoking the U4P resolution.

Although the UNGA's ability to seek justice in the face of serious international crime is still not completely solidified, there are potential legal tools the Assembly can utilize to bring perpetrators of international crimes to justice outside of an ICC referral.

REFERENCES

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