CAN WE (OR MUST WE) DELETE PARAGRAPH 6?
BLANKET IMMUNITIES AND UNITED NATIONS SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

This article addresses "blanket immunity" language in United Nations Security Council ("UNSC") resolutions, which presents one of the central, unresolved, challenges facing the International Criminal Court ("ICC"). The ICC is the apex global forum for pursuing justice and accountability for international crimes, namely genocide, crimes against humanity, and war crimes. A UNSC referral is one mechanism for triggering ICC jurisdiction. However, referrals are effectively limited as certain UNSC members can veto resolutions involving themselves and their allies (e.g. currently, a possible referral for the situation in Ukraine). This referral mechanism was built into the ICC's founding treaty, the Rome Statute. Since the Rome Statute came into effect, in 2002, two situations have been referred: Darfur (Sudan) and Libya. Discussions surrounding others, such as the situation in Syria, have failed. Referrals come by way of "referral

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paragraphs" within UNSC Resolutions. However, the resolutions referring the situations in Darfur (Sudan) and Libya (Resolutions 1593 (2005) and 1970 (2011) respectively) have also included language on "blanket immunities" in paragraph 6 of both resolutions, which restrict the ICC from exercising jurisdiction over nationals from States that are not Parties to the Rome Statute. This article tracks the history of the language, its inclusion in both resolutions and similar prior resolutions, as well as the arguments for and against the language by UNSC members. It identifies the normative legal conflicts arising from that language and explores the question of primacy between provisions like paragraph 6 in UNSC resolutions and other treaties. It then analyzes the legal effects of such language and concludes that paragraph 6 creates no legal obligations for the ICC or UN member States, regardless of whether they are parties to the Rome Statute. Instead, paragraph 6 operates much like a separable provision of an international treaty. The ICC can apply judicial review to this conflict, which may be necessary, if the ultimate objective is ending impunity for international crimes. My proposal offers ideas that can mitigate the problem of blanket immunities that have made it difficult to hold all actors equally accountable for international crimes.

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INTRODUCTION

Since the Rome Statute of the International Criminal Court ("ICC") entered into force in 2002, two situations have been referred to the ICC through the United Nations Security Council ("UNSC"): Darfur, Sudan in 2005 and Libya in 2011. In 2014, an attempt to refer the situation in Syria to the ICC vis-à-vis the UNSC failed due to vetoes by China and Russia, both permanent UNSC members with veto power.[1] Each of these situations involved armed conflicts culminating in varied allegations of the commission of international crimes, including genocide, crimes against humanity, and war crimes. The UNSC resolutions referring these situations included contentious language on "blanket immunities," attempting to shield certain individuals from the ICC's jurisdiction.[2] Despite the importance of addressing the problematic language, the issue has yet to be resolved. While there was pushback from UNSC member States, particularly nonpermanent members, against the language in the Darfur, Sudan and Libya referrals, that language was nevertheless included in the failed Syria referral.[3]

When the ICC adopted UNSC Resolution 1593 (2005),[4] there was an active peace-keeping mission in Darfur, against the backdrop of genocide, crimes against humanity, and war crimes allegations against Sudanese government officials, including then-Sudanese President Omar Al-Bashir.[5] In Libya, UNSC Resolution 1970 (2011)[6]—which initially referred said situation to the ICC against the backdrop of crimes against humanity and war crime allegations—was followed by UNSC Resolution 1973 (2011),

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[1] *See* U.N. Doc. S/2014/348 (May 22, 2014) (draft resolution referring the situation in Syria). This is, keeping in mind, that there have been discussions surrounding referrals of several other situations involving alleged international crimes within the ICC's jurisdiction, particularly from civil society.

[2] They also contain contentious language shielding the UN from the costs related to those investigations and prosecutions, although this is not covered here.

[3] *See* U.N. Doc. S/2014/348, *supra* note 1, ¶ 7.

[4] *See* S.C. Res. 1593 (Mar. 31, 2005).

[5] Being the African Union Mission in Sudan. *See* S.C. Res. 1564 (Sept. 18, 2004). This was later followed by the African Union-United Nations Hybrid Operation in Darfur (UNAMID). *See* S.C. Res. 1769 (July 31, 2007).

[6] *See* S.C. Res. 1970, ¶ 4 (Feb. 26, 2011).

which authorized an active peace-enforcement operation with a mandate to protect civilians during Libyan civil war.[7] Both resolutions—1593 (2005) and 1970 (2011)—would be passed with nearly identical paragraphs ("paragraph 6") granting immunities to nationals of non-States parties in the event that they are alleged to have committed international crimes under the ICC's jurisdiction.

The issue of "blanket immunities" has yet to be resolved. As such, this article addresses the question of whether the UNSC is able to demand "blanket immunities," thus excluding individuals from the ICC's jurisdiction in referrals. The simple answer is no. Yet, how and where should States and the ICC deal with these and future resolutions (should they arise)? This paper will focus on the language in operative paragraphs 6 of the Darfur (Sudan) and Libya resolutions (like paragraph 7 of the draft Syria resolution). It addresses whether, by introducing blanket immunities, the UNSC can create binding obligations on: a) States Parties and non-States Parties to the Rome Statute to decline the surrender of suspects falling under paragraph 6 to the ICC; and b) on the ICC to refrain from investigating and prosecuting those individuals. These issues were discussed within the UNSC, but were set aside, arguably for the purpose of securing the resolutions' passage under looming threat of veto, in order to ensure justice and accountability for victims. UNSC referrals to the ICC remain possible for contemporary and future situations involving allegations of international crimes falling within the Court's jurisdiction.

Firstly, this article will provide a brief overview of operative paragraph 6's blanket immunities in Resolutions 1593 (2005) and 1970 (2011). It will summarize the language of both resolutions, explain the legal bases and discussions around paragraph 6 (including those employed by UNSC member States), and relate UNSC resolutions that have employed similar language (namely Resolution 1422 (2002)). Secondly, it will briefly provide an overview of the possible crimes committed in the context of UN-authorized operations in Libya as an example of the ramifications of paragraph 6. Thirdly, it will discuss the conflicting normative international legal obligations arising from paragraph 6 and the possibility of judicial review over the inclusion of such language. Finally, it will discuss the array

[7] *See* S.C. Res. 1973, ¶ 4 (Mar. 17, 2011).

of possible international legal mechanisms that may be available to remedy the conflicts of law arising from paragraph 6.

I. "BLANKET IMMUNITIES" IN UNITED NATIONS SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT

A. The Language of Operative Paragraph 6 in United Nations Security Council Resolutions 1593 (2005) and 1970 (2011)

First, it is important to examine the two specific UNSC resolutions referring the Darfur, Sudan and Libya situations to the ICC Prosecutor. Paragraph 6 of the two resolutions on "blanket immunities" are practically identical.[8]

Paragraph 6 of Resolution 1593 (2005), pertaining to the situation in Darfur, Sudan, provides the following:

> *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute…shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the [UNSC] or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State…[9]

Paragraph 6 of Resolution 1970 (2011), pertaining to the situation in Libya, provides the following:

> *Decides* that nationals, current or former officials or personnel from a State outside [Libya] which is not a party to the Rome

[8] While paragraph 6's "immunities" attempts to restrict the ICC's jurisdiction, it does not automatically mean that homes States will not investigate and prosecute. However, based on the discussions on these resolutions and similar ones, this author is inclined to believe otherwise.

[9] *See* S.C. Res. 1593, *supra* note 4, ¶ 6.

> Statute…shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in [Libya] established or authorized by the [UNSC], unless such exclusive jurisdiction has been expressly waived by the State…[10]

The language of both resolutions is also nearly identical to that of the failed UNSC resolution that attempted to refer the Syria situation to the ICC.[11] The language comes from a history of discussions leading up to the Rome Statute that sought to exclude UNSC-mandated operations from the Court's jurisdiction.[12] The two resolutions attempt to restrict the ICC's ability to exercise jurisdiction over nationals of a non-State party to the Rome Statute involved in UNSC-established (or authorized) operations (such as peacekeepers or armed forces).[13] Instead, persons alleged to have committed international crimes who would otherwise fall under the ICC's jurisdiction would be subject to the exclusive jurisdiction of their respective home States unless jurisdiction is waived.[14] Absent such a clause, the ICC

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[10] *See* S.C. Res. 1970, *supra* note 6, ¶ 6.

[11] U.N. Doc. S/2014/348, *supra* note 1, ¶ 7 ("Decides that nationals, current or former officials or personnel from a State outside the Syrian Arab Republic which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Syrian Arab Republic established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State…").

[12] *See* Andreas Zimmermann, *Acting Under Chapter VII (…)' – Resolution 1422 and Possible Limits of the Powers of the Security Council*, *in* VERHANDELN FÜR DEN FRIEDEN/NEGOTIATING FOR PEACE – LIBER AMICORUM TONO EITEL 253, 257 (J.A. Frowein et al. eds., 2003) [hereinafter Zimmermann (2003)]. The French proposal for such immunities found little to no support and was abandoned.

[13] As opposed to those *not involved* in such operations although; for the US, it seemed to include *all* nationals of non-States Parties. *See* Andreas Zimmermann, *Two Steps Forward, One Step Backwards? Security Council Resolution 1593 (2005) and the Council's Power to Refer Situations to the International Criminal Court*, *in* VÖLKERRECHT ALS WERTORDNUNG – FESTSCHRIFT FÜR CHRISTIAN TOMUSCHAT [ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT – COMMON VALUES IN INTERNATIONAL LAW] 681, 695-98 (Pierre-Marie Dupuy et al. eds., 2006) [hereinafter Zimmermann (2006)].

[14] Another problematic aspect of these resolutions concern language in those resolutions with respect to expenses, although this is not covered here. "*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 [UN] and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily…". S.C. Res. 1970, *supra* note 6, ¶ 8. Identical language was used in the Darfur, Sudan referral; *see* S.C. Res. 1593, *supra* note 4, ¶ 7. For more on this

would be able to investigate and prosecute alleged crimes falling within the ICC's subject-matter jurisdiction committed by nationals of non-States Parties to the Rome Statute.[15]

B. The Legal Bases and Discussions Around Paragraph 6

Resolution 1593 (2005), referring the situation in Darfur, Sudan, made a clear determination that the situation constituted a threat to international peace and security.[16] Resolution 1970 (2011), referring to the situation in Libya to the ICC, did not make a clear determination.[17] Rather, the UNSC was being "*mindful* of its primary responsibility for the maintenance of international peace and security…"[18] This follows UNSC practice since the adoption of Resolution 1160 (1998) concerning the situation in Kosovo where, for the first time, the UNSC adopted a Chapter VII-based resolution without also making a formal determination within the meaning of UN Charter Article 39.[19]

Rome Statute Article 13(b) provides that the UNSC can refer a situation to the ICC Prosecutor vis-à-vis use of its Chapter VII powers.[20] Given that Article 13(b) specifically refers to UN Charter Chapter VII, it could be argued that the UNSC must make a formal finding that a threat to peace, breach of peace, or act of aggression has occurred to act under Chapter VII.[21]

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in Resolution 1593 (2005), *see* Rosa Aloisi, *A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court*, 13 INT'L CRIM. L. REV. 147, 155-57 (2013) [hereinafter Aloisi]; Robert Cryer, *Sudan, Resolution 1593, and International Criminal Justice*, 19 LEIDEN J. INT'L L. 195, 206-08 (2006) [hereinafter Cryer].

[15] *See* Rome Statute of the International Criminal Courtarts. 12-13, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[16] *See* S.C. Res. 1593, *supra* note 4, pmbl. *See also* Zimmermann (2006), *supra* note 13, at 689.

[17] *See* S.C. Res. 1970, *supra* note 6, pmbl.

[18] *Id.*

[19] *See* S.C. Res. 1160 (Mar. 31, 1998). *See also* Zimmermann (2003), *supra* note 12, at 262.

[20] *See* Rome Statute, *supra* note 15, art. 13(b).

[21] *See generally Commentary to Article 13(b) of the Rome Statute*, CLICC, LEXSITUS, https://cilrap-lexsitus.org/en/clicc/13-b/13-b (*citing* Dan Sarooshi, *Aspects of the Relationship Between the International Criminal Court and the United Nations*, 32 NETH. Y.B. INT'L L. 27, 33-34 (2001)). This was not the case with respect to S.C. Res. 1970. *See also* Nico Krisch, *Ch. VII Action with Respect to Threats to the Peace, Breaches of the*

However, such a determination may be implicit. While the determination in the Libya referral was not clear, it did not inhibit the ICC from determining admissibility of the cases against either of defendants Gaddafi or Senussi.[22] Moreover, Resolution 1970 (2011) was followed only weeks later by Resolution 1973 (2011) which *did* include a formal determination that the situation in Libya constituted a threat to international peace and security, and authorized the use of force to protect civilians.[23]

Resolution 1593 (2005) was adopted by a vote of 11 in favor, none against, and four abstentions (Algeria, Brazil, China, and the United States ("U.S.")).[24] The preamble made reference to Rome Statute Article 16, which allows for the UNSC to defer an ICC investigation or prosecution for a period of one year.[25] It also makes reference to Rome Statute Article 98(2) agreements, which the U.S. has signed with several States, demanding that any U.S. national requested by the ICC be sent to the U.S. instead.[26] As discussed further below, these two provisions were the inspiration behind the inclusion of paragraph 6. Several States were vocal in their opposition to paragraph 6, although they were willing to accept the inclusion in order to ensure that the referral passed (given the U.S. veto threat). The arguments for and against its inclusion were both legal and political in nature. The U.S. curiously argued that the language was not unusual and

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Peace, and Acts of Aggression, Article 39, *in* CHARTER OF THE UNITED NATIONS: A COMMENTARY 1294 (Bruno Simma et al. eds., 2012) (Krisch views these such situations, such as UNSC Resolution 1970 as "rare deviations"); Nico Kirsch, *Ch. VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 41*, *in* CHARTER OF THE UNITED NATIONS: A COMMENTARY 1310 (Bruno Simma et al. eds., 2012).

[22] *See* Prosecutor v. Saif Al-Islam Gaddafi, Case No. ICC-01/11-01/11-344-Red, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi (May 31, 2013), https://www.icc-cpi.int/court-record/icc-01/11-01/11-344-red; Prosecutor v. Saif Al-Islam Gaddafi, Case No. ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi (Oct. 11, 2013), https://www.icc-cpi.int/court-record/icc-01/11-01/11-466-red.

[23] *See* S.C. Res. 1973, *supra* note 7, pmbl. & ¶ 4.

[24] *See* Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of the International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005). *See also* S.C. Res. 1593, *supra* note 4.

[25] *See* S.C. Res. 1593, *supra* note 4, pmbl.; Rome Statute, *supra* note 15, art. 16.

[26] *See* S.C. Res. 1593, *supra* note 4, pmbl.; Rome Statute, *supra* note 15, art. 98(2). *See also* HUMAN RIGHTS WATCH, BILATERAL IMMUNITY AGREEMENTS (2003) https://www.hrw.org/sites/default/files/related_material/2003.06_US_Bilateral_Immunity_Agreements.pdf.

should be seen in the same light as Rome Statute Article 124, which allows for new States Parties to claim jurisdictional immunities for crimes falling only under Article 8 (war crimes) for a period of seven years.[27] It stated that it continued to "fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials of [non-States parties]."[28] Thus, for the U.S., the immunities would apply to *all* nationals of non-States parties, regardless of their roles.

Several UNSC member States directly criticized the inclusion. Algeria vaguely criticized the "use of double standards."[29] Sudan, the subject of the referral, was quick to condemn the "double standards."[30] Brazil, abstaining, criticized the "inadequate and risky interference of the [UNSC] in the constitutional basis of an independent judicial body…"[31] It added that it could not support the paragraph, in that it created "a legal exception that is inconsistent with international law."[32] Similarly, Benin stated that it regretted the "provision of immunity from jurisdiction, which runs counter to the spirit of the Rome Statute."[33] Tanzania explained that it also couldn't accept circumvention of the ICC's jurisdiction.[34] The Philippines questioned whether the UNSC had "the prerogative to mandate the limitation of the ICC under the Rome Statute once the exercise of its jurisdiction has advanced."[35] Emphasizing the need to pass the resolution regardless, it added that the paragraph "subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the [UNSC]," but "that eventuality may be well worth the sacrifice if impunity is, indeed, ended in Darfur."[36]

Other States, while against, were more forgiving. Argentina stated that the exception "should be limited exclusively to those nationals or members

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[27] *See* U.N. SCOR, 60th Sess., 5158th mtg. at 2, U.N. Doc. S/PV.5158 (Mar. 31, 2005).
[28] *Id.* at 3.
[29] *Id.* at 5.
[30] *Id.* at 12.
[31] *Id.* at 11. It further criticized reference to Article 98(2) of the Rome Statute, which has been highly controversial in its competing interpretations. For the relevance of these agreements, *see* Zimmermann (2006), *supra* note 13, at 691-92.
[32] U.N. Doc. S/PV.5158, *supra* note 27, at 11.
[33] *Id.* at 10.
[34] *See id.* at 9.
[35] *Id.* at 6.
[36] *Id.*

of the armed forces of a State that is not party to the Rome Statute that are participating in peacekeeping operations established or authorized by the [UNSC]."[37] Thus, Argentina understood that the exception would only apply to those persons participating in peacekeeping operations. Denmark stated that the paragraph "does not affect the universal jurisdiction of Member States in areas such as war crimes, torture and terrorism."[38] It added that the reference agreements purportedly concluded under Rome Statute Article 98(2) are "purely factual," and that "the reference in no way impinges on the integrity of the Rome Statute."[39] France was willing to recognize jurisdictional immunity "for certain nationals or personnel of States not parties to the Rome Statute," but that it "obviously cannot run counter to other international obligations of States and will be subject, where appropriate, to the interpretation of the Courts of [France]."[40] Greece added that the exception "will create certain problems of interpretation regarding the application of the principle of exclusive international jurisdiction" and that "the resolution does not infringe on that principle, which is firmly rooted in the Statute of the Court and in other international agreements."[41]

Ultimately, the draft resolution included paragraph 6 and passed, with the U.S. abstaining.[42] Like similar prior resolutions (discussed below), Resolution 1593 (2005) was a typical example of the U.S.'s power to inhibit the pursuit of justice and accountability as a permanent UNSC member State (like China and Russia, with respect to attempted Syria referral). China, another non-State Party to the Rome Statute, agreed with the U.S., explaining that it "cannot accept any exercise of the ICC's jurisdiction against the will of non-State parties, and we would find it difficult to endorse any [UNSC] authorization of such an exercise of jurisdiction by the ICC."[43] Russia, the third and final non-State Party of permanent UNSC member States, voted in favor without commenting on paragraph 6.[44] The United

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[37] *Id.* at 8.
[38] *Id.* at 6.
[39] *Id.*
[40] *Id.* at 8.
[41] *Id.* at 9.
[42] Along with Algeria, Brazil, and China. *See* S.C. Re. 1593, *supra* note 4.
[43] U.N. Doc. S/PV.5158, *supra* note 27, at 5.
[44] *See id.* at 10.

Kingdom ("U.K."), a State Party to the Rome Statute, also made no reference to paragraph 6.[45]

Several years later, the language would find its way into the draft of Resolution 1970 (2011) referring the Libya situation, attempting to restrict the ICC's exercise of jurisdiction over certain persons.[46] Because swift and decisive action was needed for Libya, draft paragraph 6 did not trigger the same level of criticism as paragraph 6 of Resolution 1593 (2005).[47] Unlike Resolution 1593 (2005), Resolution 1970 (2011) was adopted unanimously.[48] India, a non-State Party to the Rome Statute known for its peacekeeping contributions, called to "draw attention to paragraph 6," without further elaboration. [49] Brazil opposed "the exemption from jurisdiction of nationals of those countries not parties to the Rome Statute."[50] While voting in favor, Brazil expressed its "strong reservation," explaining that "initiatives aimed at establishing exemption of certain categories of individuals form the jurisdiction of the [ICC] are not helpful to advancing the cause of justice and accountability and will not contribute to strengthening the role of the Court."[51] Other UNSC member States were silent on the matter, which may have been to ensure the passing of the resolution due to the exigencies of the Libya situation.[52]

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[45] *See id.* at 7. For more on the obligations of States Parties voting for the resolution, *see* Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14 EUR. J. INT'L L. 85, 100-01 (2003) [hereinafter Stahn].

[46] There was no reference to Article 98(2) here. For more on Rome Statute Article 98, *see* Aloisi, *supra* note 14, at 155.

[47] *See id.* at 162.

[48] *See* S.C. Res. 1970, *supra* note 6.

[49] U.N. SCOR, 66th Sess., 6491st mtg. at 2, U.N. Doc. S/PV.6491 (Feb. 26, 2011). *See also Troop and Police Contributors*, U.N. PEACEKEEPING, https://peacekeeping.un.org/en/troop-and-police-contributors.

[50] U.N. Doc. S/PV.6491*, supra* note 49, at 7.

[51] *Id.* While this may seem to lean towards a political objection, it can be read in line with Brazil's previous objection to S.C. Res. 1593.

[52] *See* Meetings Coverage, Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protestors, U.N. Meetings Coverage SC/10187/REV.1 (Feb. 26, 2011).

C. Similar Language in Other United Nations Security Council Resolutions

The language used in both Resolutions 1593 (2005) and 1970 (2011) was not novel. Similar language on "blanket immunities" had appeared in previous UNSC resolutions that were not specifically referrals but dealt with the relationship between the UNSC and the ICC.

Resolution 1422 (2002) was the first resolution that contained similar language to paragraph 6 of Resolutions 1593 (2005) and 1970 (2011).[53] Resolution 1422 (2002) was adopted under UN Charter Chapter VII without a determination of—but rather a passing reference to—a threat to international peace and security pursuant to UN Charter Article 39.[54] It was adopted unanimously, although the arguments (and their responses) employed were based on slightly varying legal and political grounds.[55] Resolution 1422 (2002) centered on a broad and rather curious interpretation of Rome Statute Article 16, which provides the UNSC powers to defer an investigation or prosecution by a resolution adopted under UN Charter Chapter VII.[56] Resolution 1422 (2002) was especially peculiar due to its language on "blanket immunities" for persons from non-States Parties to the Rome Statute involved in *any future* UN-established or authorized operations for a period of one year,[57] and because it did not concern any specific pending "investigation" or "prosecution." However, as Carsten Stahn notes, "[t]he drafting history of Article 16 makes it quite clear that the founding fathers of the Statute intended to limit the use of the deferral possibility to case-by-case interventions by the Council."[58] Thus, it could not be vague or abstract.

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[53] *See* S.C. Res. 1422 (July 12, 2002). For more on this resolution and the drafting process and proposals, *see* Zimmermann (2003), *supra* note 12. *See also* the discussions on S.C. Res. 1410 (May 17, 2002) (pertaining to the situation in East Timor) and the discussion in Zimmermann (2003), *supra* note 12, at 258.
[54] *See* S.C. Res. 1422, *supra* note 53, pmbl.
[55] *See* U.N. SCOR, 57th Sess., 4568th mtg., U.N. Doc. S/PV.4568 (July 10, 2002).
[56] *See* Rome Statute, *supra* note 15, art. 16; U.N. Charter Ch. VII.
[57] For more on this, *see* Zimmermann (2003), *supra* note 12, at 256-57.
[58] Stahn, *supra* note 45, at 89. *See also id.* at 88-91.

Resolution 1422 (2002) provided the following:

> 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;
> 2. *Expresses* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;
> 3. *Decides* that Member States shall take no action inconsistent with paragraph 1 and with their international obligations…[59]

As mentioned, acting under UN Charter Chapter VII, the UNSC made no finding of a threat to peace, breach of the peace, or act of aggression, but determined "that it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council."[60]

There are inherent conflicts between paragraph 1 of Resolution 1422 (2002)—which attempts to provide for an open-ended deferral under Rome Statute Article 16—and other international obligations, including vis-à-vis the Rome Statute, as well as general international law.[61] While paragraph 1 of the resolution includes the commonly used term "requests" as opposed to other terms like "determines" or "decides,"[62] it seemingly attempted to create obligations on the ICC itself as an international organization (as opposed to States), as it did on UN member States with the use of the term "decides" in paragraph 3.[63] Resolution 1422 (2002) thus requested the *automatic* use of Rome Statute Article 16 for any and all future cases

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[59] S.C. Res. 1422, *supra* note 53, ¶¶ 1-3.
[60] *See id.* pmbl.
[61] For more on Resolution 1422 (2002) in this regard, *see* Zsuzsanna Deen-Racsmány, *The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council*, 49 NETH. INT'L L. REV. 353 (2002) [hereinafter Deen-Racsmány]; Mohamed El Zeidy, *The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422*, 35 VAND. J. TRANSNAT'L L. 1503 (2002) [hereinafter Zeidy]; Stahn, *supra* note 45.
[62] *See generally Drafting Resolutions*, U.N., https://www.un.org/en/model-united-nations/drafting-resolutions.
[63] *See* S.C. Res. 1422, *supra* note 53, ¶ 3.

involving nationals of non-States Parties to the Rome Statute.[64] Per the resolution, the onus is then on the UNSC to decide otherwise were the ICC to consider entertaining such an investigation or prosecution and further "express[es] the intention" to renew the request on an annual basis, while calling upon UN member States to comply with the request.[65] In many ways, it was Rome Statute Article 16 in reverse.

The resolution was adopted on July 12, 2002, shortly after the Rome Statute had entered into force on July 1, 2002.[66] Bosnia and Herzegovina had signed the Rome Statute, which would have been in effect immediately on the date of its entry into force.[67] It was against this background that the U.S. pushed to ensure that citizens of non-States Parties (particularly its own) would never be subject to the ICC's jurisdiction.[68] In order to ensure its demands were met, the U.S. vetoed the extension of the Bosnia and Herzegovina peacekeeping mandate set to expire, but agreed to two short extensions until Resolution 1422 (2002) passed.[69]

Much like the discussion pertaining to Resolutions 1593 (2005) and 1970 (2011), there were several issues at play in the discussions between UNSC member States.[70] The U.S. stated that it was concerned with "politicized prosecutions."[71] The U.S. argued that its proposal (claiming it was "urged to do by other [UNSC] members") was consistent with the terms of Rome Statute Article 16 as well as the UNSC's primary responsibility for maintaining international peace and security, with little support for that claim.[72] However, as noted, Article 16 was only to be used on a case-by-case basis, and only for an already existing investigation or prosecution; the U.S.

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[64] *See* Rome Statute, *supra* note 15, art. 16.
[65] *See* S.C. Res. 1422, *supra* note 53, ¶ 2.
[66] *See id.*
[67] *See* Rome Statute, *supra* note 15, art. 126.
[68] *See* Press Release, Security Council, Security Council Requests International Criminal Court Not to Bring Cases Against Peacekeeping Personnel from States Not Party to Statute, U.N. Press Release SC/7450 (July 12, 2002).
[69] *See* Press Release, Security Council, Security Council Rejects Draft Proposing Extension of United Nations Mission in Bosnia and Herzegovina, U.N. Press Release SC/7437 (June 30, 2002); S.C. Res. 1420 (June 30, 2002) (extending until July 3, 2002, for a total of 3 days); S.C. Res. 1421 (July 3, 2002) (extending until July 15, 2002); S.C. Res.1423 (July 12, 2002) (extending for the remainder of the year).
[70] *See* U.N. Doc. S/PV.4568, *supra* note 55.
[71] Press Release, Security Council, Bosnia Mission Mandate in Question, as Security Council Debates Legal Exposure of UN Peacekeepers, U.N. Press Release SC/7445/Rev. 1 (July 10, 2002).
[72] U.N. Doc. S/PV.4568, *supra* note 55, at 10. *See also* Stahn, *supra* note 45, at 88 ("The troublesome development is that the interpretation of Article 16 in SC Resolution 1422 (2002) is not identical with that reflected in the Rome Statute").

proposal preempted that. The U.S. veto threat, they explained, was not their rejection of the peacekeeping mission; rather, it was their "inability to convince their colleagues on the [UNSC] to take seriously [their] concerns about the legal exposure of our peacekeepers under the Rome Statute."[73]

Several arguments were made against the U.S., with the overwhelming majority of UNSC member States against the proposal.[74] In particular, these arguments included the misuse of Article 16 (and other relevant provisions of the Rome Statute), the UNSC acting *ultra vires*, and the UNSC's attempts to alter a treaty (the Rome Statute) contrary to international treaty law.[75] After a deeply contested discussion, the UNSC received a letter from Brazil, Canada, New Zealand, and South Africa challenging "the legitimacy of the [UNSC]'s arrogating to itself the right to interpret and to change the meaning of treaties."[76] The letter explained that the resolution would create a "perpetual obstacle to court action" and that the UNSC would disincentivize States to surrender personnel alleged to have committed international crimes.[77]

Resolution 1487 (2003) renewed Resolution 1422 (2002) shortly before its expiration.[78] The UNSC, acting again under UN Charter Chapter VII, further expressed its intention to review the request to renew an Article 16 deferral "for as long as may be necessary."[79] States reiterated their concerns with the misuse of Rome Statute Article 16 and the U.S. attempts to use the UNSC to alter the Rome Statute.[80] Three States abstained on the basis of their critiques, namely France, Germany, and Syria.[81] While Resolution 1422 (2002) was argued between States on the basis of Rome Statute Article

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[73] U.N. Doc. S/PV.4568, *supra* note 55, at 9.
[74] *See id.*; U.N. SCOR, 57th Sess., 4568th mtg., U.N. Doc. S/PV.4568 (Resumption 1) (July 10, 2002).
[75] *See* U.N. Doc. S/PV.4568, *supra* note 55; U.N Doc. S/PV.4568 (Resumption 1), *supra* note 74. *Ultra Vires* meaning beyond or exceeding given legal power or authority.
[76] Press Release, Security Council, Security Council Requests International Criminal Court Not to Bring Cases Against Peacekeeping Personnel From States Not Party to Statute, U.N. Press Release SC/7450 (July 12, 2002).
[77] *Id.*
[78] *See* S.C. Res. 1487 (June 12, 2003).
[79] *Id.* ¶ 2.
[80] *See* U.N. SCOR, 58th Sess., 4772nd mtg, U.N. Doc. S/PV.4772 (June 12, 2003).
[81] France and Germany being States Parties to the Rome Statute. *See* Press Release, Security Council, Security Council Requests One-Year Extension of UN Peacekeeper Immunity from International Criminal Court, U.N. Press Release SC/7789 (June 12, 2003). *See* Stahn, *supra* note 45, at 100 ("The question is therefore not so much whether the Council violated its obligations under the Charter when adopting Resolution 1422 (2002), but rather whether states that are both Council members and parties to the Rome Statute violated their obligations under the Statute").

16, the provision was merely "recalled" in the preambles of Resolutions 1593 (2005) and 1970 (2011).[82]

UNSC Resolution 1497 (2003), establishing a multinational force in Liberia to support the implementation of a ceasefire there, also attempted to impose blanket immunities akin to what was later included in paragraph 6 of Resolutions 1593 (2005) and 1970 (2011).[83] There, the UNSC determined that the situation in Liberia constituted a threat to peace, and acted under UN Charter Chapter VII. Paragraph 7 of the resolution provided the following:

> *Decides* that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the [ICC], shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or [UN] stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State…[84]

The resolution entertained no such referral to the ICC.

Nonetheless, France, Germany, and Mexico abstained from voting because of the provision. Mexico clearly opposed the paragraph and proposed its omission.[85] Mexico argued that the language "would set a serious precedent by doing away with the prerogatives of States whose legislation provides for the exercise of criminal jurisdiction in cases where crimes are committed against their nationals abroad."[86] Further, Mexico argued that the paragraph failed to meet the objective of "the elimination of impunity."[87] Germany added that it could not agree with the paragraph and abstained, explaining that the paragraph

> [N]ot only limits national jurisdiction of the [ICC] but goes beyond that. It limits national jurisdiction of third countries with respect to

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[82] *See* S.C. Res. 1593, *supra* note 4, pmbl.; S.C. Res. 1970, *supra* note 6, pmbl.
[83] *See* S.C. Res. 1497, ¶ 7 (Aug. 1, 2003).
[84] *Id.*
[85] *See* U.N. SCOR, 58th Sess., 4803rd mtg. at 2, U.N. Doc. S/PV.4803 (Aug. 1, 2003).
[86] *Id.* This, Mexico explained, would have been "in specific contravention" to Mexico's laws.
[87] *Id.*

> crimes committed by members of the multinational force or a [UN] stabilization force if that member is the national of a State not party to the Rome Statute of the ICC.[88]

Further, Germany argued that the paragraph would prevent prosecutors from exercising jurisdiction over crimes committed against its nationals.[89] Germany argued that the "purpose of that paragraph could have been met by concluding a bilateral statute of forces agreement, as has been done in previous instances and in other peacekeeping operations."[90] In sum, Germany concluded that the paragraph was "not in accordance with international and German law."[91]

The U.S. made no mention of the paragraph. China simply took note of the concerns of UNSC member States with paragraph 7.[92] Chile explained that

> …personnel of the [UN] and of specialized agencies are granted certain privileges and immunities, including immunity from criminal prosecution. The same is true of bilateral agreements on the status of forces vis-à-vis the host country. We are concerned about the fact that, by making exceptions, we might impede the harmonious development of international law.[93]

France explained that it could not vote in favor due to the "establishment of exclusive jurisdiction by the national criminal courts of State participating in this operation for the prosecution of their nationals."[94] France added that it did "not believe that the scope of the jurisdictional immunity thus created is compatible with the provisions of the Rome Statute…the norms of French law or the principles of international law."[95]

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[88] *Id.* at 4.
[89] *See id.*
[90] *Id.*
[91] *Id.*
[92] *See id.* at 6.
[93] *Id.*
[94] *Id.* at 7.
[95] *Id.* Like other UNSC member States, there were specific critiques of the conflict between paragraph 7 with not only international law, but to the domestic law of respective States.

Overall, the arguments in each of the UNSC resolutions discussed above, both for and against, were scattered. The basis in favor of blanket immunities was largely political, dressed in various legal arguments favored by the UNSC's three non-States Parties to the Rome Statute: China, Russia, and the U.S. Given the precedent, it is possible that in the case of future UNSC referrals to the ICC Prosecutor, the language—or variation thereof—will be included, as it was included during the attempt to refer the situation in Syria. To see then, how paragraph 6 would, or could, play out, one could explore the example of possible crimes committed in the context of the UN-authorized operations in Libya.

II. POSSIBLE CRIMES COMMITTED IN THE CONTEXT OF UN-AUTHORIZED OPERATIONS IN LIBYA

While paragraph 6 has been used in both Resolutions 1970 (2011) and 1593 (2005), one can draw a distinction between the peace operations in Darfur, Sudan and in Libya; the former constituted a peacekeeping mission and the latter a fully operative peace-enforcement operation involving use of force. Given the nature of the Libya operation, it is more relevant to look there in terms of possible crimes committed by non-States Parties to the Rome Statute, like the U.S., participating in North Atlantic Treaty Organization (NATO) operations. This can help provide some insight on the approach taken so far by the ICC, as well as to set up a scenario where the normative legal conflicts caused by paragraph 6 may come into play.

In its second report to the UNSC under operative paragraph 7 of Resolution 1970 (2011), the ICC Prosecutor referred to the report of the UN International Commission of Inquiry on the human rights situation in Libya, including allegations of indiscriminate attacks on civilians by NATO forces.[96] The International Commission of Inquiry on Libya was mandated by the UN Human Rights Council to investigate alleged violations of

[96] *See* Second Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), ¶ 54 (Nov. 2, 2011), https://www.icc-cpi.int/news/second-report-prosecutor-international-criminal-court-un-security-council-pursuant-unscr-1970.

international human rights law ("IHRL") and identify those responsible with a view of accountability.[97] In its third report, the ICC Prosecutor explained that it focused its attention to incidental loss of life or injury to civilians, based on the non-finding of violations by the UN commission of inquiry.[98] In its fourth report, the Prosecutor mentioned that the office was in communication with NATO to address concerns raised by the UN commission of inquiry regarding incidental loss of life.[99] In its fifth report, the Prosecutor stated that there was

> [N]o information to conclude that NATO air strikes which may have resulted in civilian death and injury or damaged civilian objects were the result of the intentionally directing of attacks against the civilian population as such or against civilian objects which would be clearly excessive to the anticipated military advantage.[100]

Then, further mention of NATO disappeared. Nevertheless, its early mentions may imply the Prosecutor's non-recognition of, or obliviousness to, paragraph 6's attempted limitations. These NATO operations included nationals from both States Parties (such as *inter alia* Canada, France, and the U.K.) and non-States Parties to the Rome Statute (namely the U.S.).[101]

In its second report, the UN Commission of Inquiry found that while NATO forces "did not deliberately target civilians in Libya," there were

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[97] *See* Human Rights Council Res. S-15/1, U.N. Doc. A/HRC/Res/S-15/1 (Feb. 25, 2011).
[98] *See* Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), ¶¶ 51-55 (May 16, 2012), https://www.icc-cpi.int/news/third-report-prosecutor-international-criminal-court-un-security-council-pursuant-unscr-1970 (under Rome Statute Article 8(2)(b)(iv)).
[99] *See* Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), ¶ 11 (Nov. 7, 2012), https://www.icc-cpi.int/news/fourth-report-prosecutor-international-criminal-court-un-security-council-pursuant-unscr-1970.
[100] Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), ¶ 13 (May 8, 2013), https://www.icc-cpi.int/news/fifth-report-prosecutor-international-criminal-court-un-security-council-pursuant-unscr-1970 (but then adds: "The Office encourages NATO to cooperate fully in Libya's national efforts to investigate civilian casualties. The Office appreciates NATO's cooperation in this regard and will continue to monitor the situation").
[101] For more on this, *see NATO & Libya (Archived)*, NATO, https://www.nato.int/cps/en/natohq/topics_71652.htm (Nov. 9, 2015).

instances in which they could not yet determine whether NATO took all necessary precautions to avoid civilian casualties.[102] While failure to take precautions is not a war crime under the Rome Statute, it does not exclude the possibility that those attacks may have resulted in other war crimes, such as "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians…which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" under Rome Statute Article 8(2)(b)(iv).[103] In two incidents, NATO airstrikes which damaged civilian infrastructure were not found to be near a military target.[104] In another incident, NATO strikes killed thirty-four civilians—sixteen in an initial airstrike and eighteen after a group of rescuers had arrived.[105] The Commission's request to NATO for additional information was met with disagreement, stating the Commission's mandate was to investigate violations of IHRL, not international humanitarian law ("IHL").[106] Further, NATO objected to what it perceived as an expansion of the Commission's mandate in looking beyond the context of the political protests taking place at the time of the Commission's establishment, before NATO involvement.[107] Its response was rather dismissive and hostile, asking that "NATO incidents" not be included in the report and, if so, to "clearly state that NATO did not deliberately target civilians and did not commit war crimes in Libya."[108]

Nonetheless, NGOs have also documented civilian deaths as a result of NATO airstrikes during the course of the conflict. For example, Amnesty International documented five airstrikes on homes, resulting in the deaths

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[102] *See* Rep. of the Int'l Comm'n of Inquiry on Libya, U.N. Doc. A/HRC/19/68, at 17 (Mar. 8, 2012).
[103] Rome Statute, *supra* note 15, art. 8(2)(b)(iv).
[104] *See* U.N. Doc. A/HRC/19/68, *supra* note 102, at 16. *See also* Elements of Crimes, Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/1/Add.2, art. 8(2)(b)(iv), n.36 & n.37 (2000).
[105] *See* U.N. Doc. A/HRC/19/68, *supra* note 102, at 16.
[106] *See* Correspondence from NATO to the International Commission of Inquiry on Libya (Dec. 20, 2011) in: *id*. at 26.
[107] *See* Correspondence from NATO to the International Commission of Inquiry on Libya (Feb. 15, 2012) in: *id*. at 37-38.
[108] *Id*. at 38.

of fifty-five civilians.[109] Amnesty requested information from NATO on its investigations, but NATO responded that they no longer had a mandate in Libya and that it was the primary responsibility of the Libyan authorities to respond to requests for investigations and claims.[110] Eight NATO airstrikes were also investigated by Human Rights Watch, which resulted in the deaths of seventy-two civilians, including twenty women and twenty-four children.[111] Human Rights Watch echoed Amnesty's call for investigations meeting international standards, stating that NATO fell short of its obligation to investigate.[112] NATO responded by stating that they "looked into each credible allegation" and they told the Libyan authorities that they are ready to support their efforts in reviewing particular events. [113] Representatives of a number of States, including Russia and South Africa, also went on to raise concerns about investigations on civilian casualties.[114]

The allegations against NATO forces exemplify a situation where, theoretically, the ICC might face (or might have faced) the implications of paragraph 6. NATO forces included nationals of non-States Parties to the Rome Statute. Should one of those nationals fall under the ICC's scrutiny, the ICC will be faced with a situation where they will have to assess the conflicting normative obligations between paragraph 6 and the Rome Statute. States, too, whether they are Parties or non-Parties to the Rome Statute, will also have to assess whether they should apprehend a suspect

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[109] *See Libya: Civilian Deaths From NATO Airstrikes Must be Properly Investigated*, AMNESTY INT'L (Mar. 19, 2012), https://www.amnesty.org/en/latest/news/2012/03/libya-civilian-deaths-nato-airstrikes-must-be-properly-investigated/.
[110] *See* Amnesty Int'l, *Libya: The Forgotten Victims of NATO Strikes,* Index No. MDE 19/003/2012, at 18 (Mar. 2012), https://www.amnesty.org/en/wp-content/uploads/2021/07/mde190032012en.pdf.
[111] *See NATO: Investigate Civilian Deaths in Libya,* HUM. RTS. WATCH (May 14, 2012), http://www.hrw.org/news/2012/05/14/nato-investigate-civilian-deaths-libya.
[112] *See Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya*, HUM. RTS. WATCH, at 23 (May 2012), http://www.hrw.org/sites/default/files/reports/libya0512webwcover_0.pdf.
[113] *See* Press Release, NATO, Statement by the NATO Spokesperson on Human Rights Watch Report (May 14, 2012), http://www.nato.int/cps/en/natolive/news_87171.htm.
[114] *See* Michael Astor, *UN Diplomat wants Libya NATO Investigation*, AP NEWS (Jan. 4, 2012), https://apnews.com/article/russia-ukraine-middle-east-africa-europe-united-nations-3f0d4a70b5804479b1b1ff05a16dee04; David Bosco, *Russia to ICC: Investigate NATO*, FOREIGN POL'Y (May 18, 2012), https://foreignpolicy.com/2012/05/18/russia-to-icc-investigate-nato/.

falling under paragraph 6. These conflicting normative obligations are further discussed below, followed by a number of hypotheticals.

III. CONFLICTING NORMATIVE OBLIGATIONS & JUDICIAL REVIEW

There are conflicting normative obligations between those flowing from the UNSC resolutions and those flowing from the Rome Statute. The first issue is a question of primacy between UNSC resolutions (or particular provisions like paragraph 6) and other treaty obligations. The second issue is a question of the legal effects of UNSC resolutions (or at least of particular provisions like paragraph 6). The purpose of this section is to consider possible substantive approaches of judicial review—or some variation thereof—in dealing with conflicting normative obligations between UNSC decisions and other international legal obligations. These approaches are not definitive but may nevertheless provide some insight into how the ICC and others may assess the legality and effects of paragraph 6.

Prima facie, by way of UN Charter Article 103, "[i]n the event of a conflict between the obligations of [UN Members] under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[115] Under UN Charter Article 25, "[UN member States] agree to accept and carry out the decisions of the [UNSC] in accordance with the present Charter."[116] Language is key, as the language of any given resolution must amount to a "decision" that is legally binding.[117] Resolutions 1593 (2005) and 1970 (2011) clearly begin with "decides"—referring the situation and demanding

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[115] U.N. Charter art. 103.

[116] *But see* Zimmermann (2006), *supra* note 13, at 697-98 (in relation to Resolution 1593 (2005) in particular, and the differences that play out for States Parties vs. non-States Parties to the Rome Statute); Zimmermann (2003), *supra* note 12, at 271-76.

[117] *See* Anne Peters, *Ch. V The Security Council, Functions and Powers, Article 25, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, VOLUME I 787, 792-93 (Bruno Simma et al. eds., 3rd ed. 2012) [hereinafter Peters]. *See also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 114 (June 21) [where the ICJ mentions "as criteria the Act's wording, its genesis, its legal basis, and the context of its adoption"].

immunities—explicitly a UNSC *decision* that they are legally binding.[118] UN member States are obligated to "agree and carry out" said decisions, by virtue of UN membership.[119] Yet, this alone does not resolve the issue given that there have been occasions where such decisions conflict with other legal obligations.

The International Court of Justice ("ICJ") *Lockerbie* case (between Libya and the U.S./U.K.) provides some insight on assessing competing normative obligations between a UNSC resolution and a treaty.[120] In *Lockerbie*, Libya argued that, in complying with their obligations under the Montreal Convention,[121] which stipulates the obligation to extradite or prosecute for alleged criminal acts committed therein, and in conjunction with Libyan law, they could not surrender the Lockerbie bombings suspects, who were Libyan nationals.[122] In effect, the State has the option to prosecute *or* extradite.[123] In attempting to override the either/or option, the UNSC decided that Libya must surrender the suspects to the U.K., as requested.[124] The ICJ ordered Libya to accept and carry out the UNSC decisions, rather than its treaty obligations.[125] It did not definitely answer the question of

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[118] *See* S.C. Res. 1593, *supra* note 4, ¶¶ 1, 6; S.C. Res. 1970, *supra* note 6, ¶¶ 4, 6.
[119] Peters, *supra* note 117, at 795.
[120] *See* Zimmermann (2003), *supra* note 12, at 276. The case concerned the situation arising from the bombing of Pan Am Flight 103 on Dec. 21, 1998, over Lockerbie, Scotland, where 270 people were killed, and Libyan Abdelbaset Ali Mohmed al-Megrahi was convicted by a special court at Camp Zeist in The Netherlands by three sitting Scottish judges.
[121] *See* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 973 U.N.T.S. 177 [hereinafter Montreal Convention].
[122] *See* S.C. Res. 731 (Jan. 21, 1992); S.C. Res. 748 (Mar. 31, 1992). In both of these resolutions, the UNSC decided that the Libyan government must comply with the "requests contained in documents S/23306, S/23308 and S/23309." S/22308 specifically includes a joint declaration from the US and the UK which states that the Libyan government "must…surrender for trial all those charged with the crime; and accept responsibility for the actions of Libyan officials." *See also* S.C. Res. 883 (Nov. 11, 1993). When Libya filed its applications with the ICJ, only Resolution 731 (1992) had been passed, and not under UN Charter Ch. VII. Resolution 748 (1992) was then adopted under Ch. VII a couple of days after the oral hearings. *See* John P. Grant, *Lockerbie Trial*, MAX PLANCK ENCYC. PUB. INT'L L. (Jan. 2013), ¶¶ 13-14 [hereinafter Grant].
[123] *See* Montreal Convention, *supra* note 121, at arts. 7-8.
[124] *See* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.A.), Provisional Measures, 1992 I.C.J. Rep. 9 (Apr. 14) [hereinafter ICJ Lockerbie Provisional Measures]; *see also supra* note 122.
[125] *See* ICJ Lockerbie Provisional Measures, *supra* note 124, ¶ 42. Of course, it is not without a rich collection of declarations, separate opinions, and dissenting opinions. The

primacy as that would have to be left for the merits; this was only an order on provisional measures with some *prima facie* findings, and *not* a judgment.[126] This was later revisited in the preliminary objections stage, but never fully explored.[127] While the ICJ did not perform a judicial review of the actual UNSC resolution, it did not rule out its ability to do so.[128] As such, the ICJ did not definitively rule as to whether a UNSC resolution can (or did) "trump a treaty."[129] As Lydia Davies-Bright and Nigel White note, "although art. 103 of the UN Charter gives UNSC Resolutions primacy over preexisting international obligations, it does not provide that such resolutions are supreme and unquestionable."[130] Davies-Bright and White appropriately conclude that "the *Lockerbie* cases demonstrate that influential states utilizing powerful international organizations are able to circumvent the provisions of international law."[131]

In comparison, in the context of paragraph 6 and the ICC, there is a clear normative conflict between: a) obligations under the UN Charter and compliance with UNSC resolutions; and b) cooperation obligations under a treaty (the Rome Statute), where a situation is referred by the UNSC. These conflicts concern obligations that may be owed by the ICC, as well as States themselves. The *Lockerbie* cases did not involve a separate, independent legal personality like the ICC, let alone a similar obligation to cooperate with

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ICJ provided no reasoning behind the order, although the opinions are informative. *See* Lydia Davies-Bright & Nigel D. White, *3 Institutional Structure and the Position of Members, 3.1 Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya Arab Jamahiriya v United States of America), Request for the Indication of Provisional Measures, Order of 14 April 1992, [1992] ICJ Rep 114*, *in* OXFORD SCHOLARLY AUTHORITIES ON INTERNATIONAL LAW [OSAIL] JUDICIAL DECISIONS ON THE LAW OF INTERNATIONAL ORGANIZATIONS 126 (Cedric Ryngaert et al. eds., 2016) [hereinafter Davies-Bright & White].

[126] *See* ICJ Lockerbie Provisional Measures, *supra* note 124.

[127] *See* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.A.), Preliminary Objections, 1998 I.C.J. Rep. 115 (Feb. 28).

[128] There are no UN Charter provisions providing otherwise. *See* Anne Dienelt & Andreas L. Paulus, *Lockerbie Cases (Libyan Arab Jamahiriya v United Kingdom and United States of America)*, MAX PLANCK ENCYC. PUB. INT'L L., ¶¶ 23-24 (Mar. 2010) [hereinafter Dienelt & Paulus (2010)].

[129] *See* Grant, *supra* note 122, ¶¶ 15-17.

[130] Davies-Bright & White, *supra note* 125, at 126. At most, the *Lockerbie* situation should be seen as a "suspension, rather than an abrogation" of the treaty that would find itself in conflict with a later UNSC resolution; Dienelt & Paulus, *supra* note 128, ¶ 27.

[131] Davies-Bright & White, *supra note* 125, at 126.

such an institution. By way of UNSC referral, it is expected that non-States Parties to the Rome Statute are obliged to cooperate anyhow. At the very least, the *Lockerbie* cases leave the door open for judicial review of UNSC decisions.[132]

Insight might also be derived from the developments after Resolution 1422 (2002), although the broad language in that resolution is different from paragraph 6 in Resolutions 1593 (2005) and 1970 (2011). Stahn has argued that Brazil's argument, as discussed above (regarding the UNSC's attempts to exercise "treaty-making and treaty-reviewing powers"), was unpersuasive due to: (1) the UN Charter Article 2(7)'s express limitation of the *domaine reserve* in relation to Chapter VII measures; and (2) the combination of UN Charter Articles 25 and 103.[133] Stahn adds that while Article 103 "does not directly state that a Chapter VII decision prevails over any other inconsistent treaty provision," States are bound to accept and carry out binding UNSC decisions and give those obligations priority over any other commitments.[134] Yet the matter is inconclusive, having not been decisively resolved—neither by the ICC nor by the ICJ.[135] From this, it would

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[132] With the *Lockerbie Cases*, the UNSC arguably sought to achieve the same ends as the Montreal Convention: investigation and prosecution. Paragraph 6 attempts remove that possibility for certain persons, in direct contradiction of the Rome Statute.

[133] Stahn, *supra* note 45, at 99 (that the UNSC "may override specific rights and obligations of states under an existing treaty regime by using its authority under Chapter VII"). U.N. Charter art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.").

[134] *Id.* (to which this author disagrees). *See also* Neha Jain, *A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court*, 16 EUR. J. INT'L L. 239, 251 (2005) [hereinafter Jain]; "…the intention of Article 103 was not to automatically 'abrogate' inconsistent treaty obligations, but to prevent a situation where states would be subject to legal liability under other international agreements as a result of carrying out UN collective measures. To use Article 103, time and again, as a justification for Council resolutions that modify the application of another multilateral Convention would go far beyond this intended scope." (*citing* HANS KELSEN, THE LAW OF THE UNITED NATIONS 95 (1951); LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 616 (3rd ed. 1969)).

[135] However, "its legality remains contested;" Deen-Racsmány, *supra* note 61, at 368 (*citing* Vera Gowland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643, 644-46 (1994)). She also concludes that "[t]hey merely suspend the rights enjoyed by states under

be difficult to automatically conclude that the UNSC can create binding obligations superseding international treaty obligations such as those stemming from the Rome Statute (especially over its States Parties). Still, there are other significant differences between Resolution 1422 (2002) and paragraph 6 of Resolutions 1593 (2005) and 1970 (2011). For example, Resolution 1422 (2002) paragraph 1 "requests" that the ICC not commence or proceed with an investigation or prosecution.[136] Resolution 1422 (2002) could not directly bind the ICC.[137] The ICC has its own independent international legal personality.[138] As such, it would be a stretch to say that one international organization may, through its member States, bind the work of another international organization unless the latter organization expressly accepts the possibility (such as in the limited case of specific referrals or deferring investigations or prosecutions for one year). Paragraph 3 of Resolution 1422 (2002) "*[d]ecides* that Member States shall take no action inconsistent with paragraph 1 and with their international obligations," but this does not say much.[139]

Unlike paragraph 6 of Resolutions 1593 (2005) and 1970 (2011), paragraph 1 of Resolution 1422 (2002) was directed at the ICC, not at States.[140] It is possible that this concerns the obligation to cooperate, yet that might be a far-reaching interpretation. Paragraph 3 of Resolution 1422 (2002) also speaks of other "international obligations," without adding anything as clear as paragraph 6 of Resolutions 1593 (2005) and 1970 (2011).[141] As Stahn notes, paragraph 3 of Resolution 1422 (2002) does not reference the UN Charter directly, and it may imply obligations under the

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those agreements. It is rather clear that the SC has the authority to do this" (to which this author also disagrees). *Id.*

[136] *See* Stahn, *supra* note 45, at 88. As implied by States opposing para.6, Stahn notes that the use of Article 16 is only a case-by-case basis ("once a concrete 'investigation' or 'prosecution' is taking place…"). *Id.* at 90.

[137] *See id.* at 103.

[138] *See* Rome Statute, *supra* note 15, art. 4. *See* Cryer, *supra* note 14, at 213 (*citing* the UN-ICC relationship agreement: "The United Nations and the Court respect each other's status and mandate."). *See also* Dapo Akande, *The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*, 10 J. INT'L CRIM. JUST. 299, 308 (2012) [hereinafter Akande (2012)]; Jain, *supra* note 134, at 253; Deen-Racsmány, *supra* note 61, at 369 & 384-85.

[139] S.C. Res. 1422, *supra* note 53, ¶ 3.

[140] *See id.* ¶ 1.

[141] *Id.* ¶ 3.

Rome Statute (as well as other obligations).[142] Furthermore, the language of paragraph 6 of Resolutions 1593 (2005) and 1970 (2011) differs from Resolution 1422 (2002) in that the former deviates from the language of Rome Statute Article 16—it is *not* an attempt at a deferral, but an attempt to fully remove the ICC's possible exercise of jurisdiction (*i.e.* Article 16 in reverse).[143] No such decision, or even request, is directed to the ICC in paragraph 6 of Resolutions 1593 (2005) and 1970 (2011).[144] The language may be directed towards the ICC *and* States. While somewhat ambiguous, paragraph 6 of Resolutions 1593 (2005) and 1970 (2011) directly conflicts with the Rome Statute. Resolution 1422 (2002) is instructive, since the ICC would neither be bound by paragraph 1 of Resolution 1422 (2002), nor paragraph 6 of Resolutions 1593 (2005) and 1970 (2011), even if implied. For States, it is still another matter. Resolutions 1593 (2005) and 1970 (2011) include "decisions"—paragraph 6 amongst them—and, as such, require UN member States to accept and carry out those decisions in line with the language of those paragraphs.

The European Court of Justice ("ECJ") *Kadi* case may provide further insight. In *Kadi*,[145] at issue was UNSC Resolution 1267 (1999), which established a sanctions committee meant to target finances associated with the Taliban.[146] The Council of the European Union ("EU") adopted Regulation 881 in order to implement the resolution.[147] After Yassin Al-Kadi (a national of Saudi Arabia) and the Al Barakaat International Foundation (established in Sweden) were added to the EU list, Kadi took the case to the ECJ, arguing that the regulation breached several fundamental rights.[148] On the question of primacy between EU law and

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[142] *See* Stahn, *supra* note 45, at 103 ("One may therefore conclude that the effect of the compromise formula embodied in paragraph 3 of the resolution on parties to the Statute depends largely on its interpretation.").
[143] *See* Cryer, *supra* note 14, at 211.
[144] *See* S.C. Res. 1593, *supra* note 4, ¶ 6; S.C. Res. 1970, *supra* note 6, ¶ 6.
[145] *See generally* Juliane Kokott & Cristoph Sobotta, *The Kadi Case – Constitutional Core Value and International Law – Finding the Balance?*, 23 EUR. J. INT'L L. 1015 (2012).
[146] *See* S.C. Res. 1267 (Oct. 15, 1999).
[147] *See* Council Regulation (EC) No. 881/2002 of 27 May 2002, O.J. (L 139).
[148] *See* Joined Cases C-402/05 P & 415/05 P, Kadi & Al Barakaat Int'l Found. v. Council & Comm'n, 2008 E.C.R. 1-6351; being the joined cases of Kadi and Yusuf: Case T-315/01, Kadi v. Council & Comm'n, 2005 E.C.R. II-3649 [hereinafter Kadi]; Case T-306/01, Yusuf & Al Barakaat Int'l Found. v. Council & Comm'n, 2005 E.C.R. II-3533 [hereinafter Yusuf], respectively.

other international legal obligations, Allan Rosas explains that "by virtue of Article 351 [of the Treaty on the Functioning of the European Union], a Member State may be able to invoke an international agreement concluded by it *before* it became an EU member."[149] In that sense, it exemplifies a situation where UNSC resolutions (vis-à-vis UN Charter Articles 25 and 103) are recognized as having primacy over other international treaties. The Court of First Instance (CFI) dismissed the cases, deciding that UN members were required to comply with UNSC resolutions under UN Charter Article 103, having primacy over EU law.[150] Drawing from *Kadi*, Rosas explains that "(EU) Member States cannot invoke Article 351(1) in order to honor their obligations under the UN Charter, including binding decisions of the Security Council, if these obligations contravene basic fundamental rights and rule of law principles contained in the Union constitutional order."[151] As such, primacy has its limits. Yet, what does this mean in terms of the possibility of judicial review? In *Kadi*, it was reasoned that

> The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of jus cogens have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute "intransgressible principles of international customary law…[152]

As Clemens Feinäugle explains, on appeal, the Grand Chamber

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[149] Allan Rosas, *The Statute in EU Law of International Agreements Concluded by EU Member States*, 34 FORDHAM INT'L L.J. 1304, 1315 (2011) [hereinafter Rosas]. *See also* EC Treaty art. 307 (as in effect 2008) (Now TFEU art. 351).
[150] *See* Kadi, *supra* note 148, ¶ 188; Yusuf, *supra* note 148, ¶ 238.
[151] Rosas, *supra* note 149, at 1324.
[152] *See* Kadi, *supra* note 148, ¶ 231 (*see also* ¶¶ 227-30); Yusuf, *supra* note 148, ¶ 282 (*see also* ¶¶ 278-81).

> …emphasized that the review of lawfulness ensured by the Community courts applied to the Community act intended to give effect to the international agreement at issue, and not to the international agreement itself… Thus, a judgment given by the Community courts deciding that a Community measure intended to give effect to a resolution of the Security Council was contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law."[153]

As such, measures *giving effect* to UNSC decisions are potentially reviewable in limited cases, although the ECJ did not have the power to review UNSC decisions as a whole. Thus, "sanctions based on UN Security Council Resolutions cannot escape judicial review by the EU courts even though Article 103 of the UN Charter suggests that under international law the obligations arising under that Charter take precedence over other treaty obligations."[154]

Similarly, for paragraph 6, as opposed to questioning whether the UNSC resolutions which include referrals are reviewable, we may question whether measures *giving effect* to those resolutions are reviewable. A *Kadi* approach provides some guidance on reviewing the effects of paragraph 6 on the Rome Statute vis-à-vis State (or institutional) measures, rather than the referral itself (such as the process of capturing and surrendering suspects falling under, and in compliance with, paragraph 6). For the ICC, this would mean that UNSC resolutions—or at least certain parts—are *potentially* reviewable, at least to the extent of reviewing measures that attempt to give effect to resolutions in light of normative conflicts. The ICC may review measures giving legal effect to paragraph 6 and its implications on the Rome Statute, by States, without wholly reviewing the UNSC resolution. As opposed to the ICC, review powers may be broader for the ICJ (further discussed below).

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[153] Clemens Feinäugle, *Kadi Case*, MAX PLANCK ENCYC. PUB. INT'L L. (Apr. 2014), ¶ 17 (*citing* Joined Cases C-402/05 P and C-415/05 P, Kadi & Al Barakaat Int'l Found. v. Council and Comm'n, 2008 E.C.R. 1-6351, ¶¶ 281-88).

[154] Tobias Lock & Denis Martin, *Article 47 CFR*, *in* THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 2214, 2219-20 (Manuel Kellerbauer et al. eds., 2019).

Insight might also be derived from challenges to UNSC resolutions creating international courts. For example, in the *Tadić* case at the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Chambers entertained whether the ICTY was established legally vis-à-vis the UNSC's Chapter VII powers.[155] The ICTY Trial Chamber stated that they did not have the power to review UNSC resolutions, citing ICJ jurisprudence (like *Namibia* and *Lockerbie*). [156] On appeal, the ICTY Appeals Chamber explained it had the competence to review its own existence and that power is "incidental" or "inherent" to any international tribunal.[157] It (unsurprisingly) found that the ICTY was legally established, with reference to UN Charter Article 41 on measures not involving the use of armed force to find that they were not exhaustive.[158] While recognizing that it did not have powers of judicial review over UNSC Resolution 827 (1993) establishing the ICTY as a matter or "primary" jurisdiction, it did have powers to do so as a matter of "incidental" or "inherent" jurisdiction ("which derives automatically from the exercise of the judicial function").[159] Through these powers, albeit limited, the Chambers concluded the legality of its own establishment by assessing UNSC powers to invoke UN Charter Chapter VII, the range of measures under Chapter VII, and the establishment of the ICTY as one such measure.[160] Thus, while not judicial

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[155] *See* Zimmermann (2003), *supra* note 12, at 276-77.

[156] *See* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion on Jurisdiction, 11-14 & 41 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995). *See generally* Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INT'L & COMPAR. L. Q. 309 (1997).

[157] *See* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter Tadić]. ("This power, known as the principle of 'Kompetenz-Kompetenz' in German or 'la compétence de la competence' in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction.' It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done…").

[158] *See id.* ¶¶ 33-36.

[159] *Id.* ¶ 14. *See also* S.C. Res. 827 (May 25, 1993).

[160] *See* Tadić, *supra* note 157, ¶¶ 28-40.

review *per se*, the ICTY had "incidental" or "inherent" power to review the legal effects of that decision (*i.e.* its own establishment).[161]

UNSC Resolutions 1593 (2005) and 1970 (2011) are different, given that the UNSC did not create the ICC, and the UNSC derives its referral powers from the Rome Statute (in combination with its UN Charter powers).[162] In terms of exercise of jurisdiction, like Resolution 827 (1993) creating the ICTY's jurisdiction, without the referrals, the ICC would not have had jurisdiction over alleged international crimes in either Darfur, Sudan or Libya. Functionally, its jurisdiction might be considered "incidental" or "inherent." From this approach, the ICC could assess paragraph 6 when dealing with the powers granted to the UNSC by the Rome Statute Article 13(b), and whether the UNSC acted *ultra vires* in its referral—and not review the resolutions as a whole, or whether the UNSC acted *ultra vires* pursuant to the UN Charter. Should the case arise, the ICC's main concern would be whether paragraph 6 goes beyond the UNSC's powers and whether it constitutes an interference with its own competence.

The key issue for the ICC is how it would treat the attempt by the UNSC to limit its jurisdiction. Kevin Jon Heller notes that the ICC may exercise jurisdiction with respect to a "situation," as opposed to "individuals" or "individual cases." [163] He further notes Rome Statute Article 1, which provides that "[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."[164] Heller agrees with the late Robert Cryer, who uses the analogy of the situation "concerning the Lord's Resistance Army" (LRA) in Northern Uganda.[165] The ICC opened a general investigation into Northern Uganda rather than keep to Uganda's attempt to limit the Court's jurisdiction to only one party to the conflict.[166] Similarly,

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[161] For more on this, *see* RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW POLITICS AND DIPLOMACY 62-65 (2004).
[162] *See* Rome Statute, *supra* note 15, art. 16; U.N. Charter Ch. VII.
[163] Kevin Jon Heller, *Can the ICC Prosecute NATO for War Crimes Committed in Libya?*, OPINIO JURIS (May 19, 2012), http://opiniojuris.org/2012/05/19/can-the-icc-prosecute-nato-for-war-crimes-committed-in-libya/.
[164] *Id.*
[165] Cryer, *supra* note 14, at 212.
[166] *See* Doc. ICC-02/04, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II (July 5, 2004), https://www.icccpi.int/sites/default/files/CourtRecords/CR2007_02419.PDF.

it may be possible that the ICC would ignore the UNSC's attempt to limit its own jurisdiction vis-à-vis Resolutions 1593 (2005) and 1970 (2011).

The ICC should be bound by the referral paragraphs, but not paragraph 6. Resolutions can contain numerous paragraphs, and the ICC should be concerned with actual referral language (*e.g.,* "*decides* to refer the situation in…to the Prosecutor of the ICC"). The Rome Statute provides that

> 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…
>
> (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."[167]

With respect to referrals, Rome Statute Article 13(b) should be considered the extent of the legal relationship between the ICC and UNSC.[168] While the ICC has proceeded with investigations and prosecutions in Darfur, Sudan and Libya, it has not yet had the opportunity to consider the legality of paragraph 6. There has been no situation that has triggered paragraph 6. In Uganda, the ICC has not reviewed Uganda's attempt to limit jurisdiction through any particular case. Yet, the ICC Office of the Prosecutor has clarified that

> …[t]he letter of referral made reference to the 'situation concerning the Lord's Resistance Army'. My Office has informed the Ugandan authorities that we must interpret the scope of the referral consistently with the principles of the Rome Statute, and hence we are analyzing crimes within the situation of northern Uganda by whomever committed.[169]

Thus, for Uganda, the ICC Prosecutor did not limit the situation to alleged crimes committed by only the LRA, but to all parties involved.

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[167] Rome Statute, *supra* note 15, art. 13(b).
[168] Whether it decides to employ Article 16 is treated as a separate matter.
[169] Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, *supra* note 166.

If the UNSC referrals were reviewed as a whole (by the ICC, but also possibly by the ICJ as explained below) they may also consider the nature of UNSC resolutions in relation to traditional treaty-making. In the *Kosovo* advisory opinion, the ICJ explained that the rules of treaty interpretation of UNSC resolutions differ from traditional treaty interpretation as provided by the Vienna Convention on the Law of Treaties (VCLT) Articles 31 and 32.[170] For one, UNSC resolutions are binding on all member States.[171] The ICJ also explained:

> The interpretation of [UNSC] resolutions may require the Court to analyze statements by representatives of members of the [UNSC] made at the time of their adoption, other resolutions of the [UNSC] on the same issue, as well as the subsequent practice of relevant [UN] organs and of States affected by those given resolutions.[172]

As the above-mentioned UNSC discussions demonstrate, most States did not support paragraph 6 with few exceptions, like the U.S., and likely China and Russia.[173] Nevertheless, States either voted in favor of both resolutions, or abstained.[174] Here, the particular questionable "provision"—paragraph 6—may be considered separate from the remainder of the resolution or at least from the language which includes the referral pursuant to Rome Statute Article 13(b).[175] Cryer notes a potential argument: that the referral may be considered void as a whole, but finds this possibility unlikely.[176] The resolutions can continue to have effect, whereas "blanket immunities" are not essential to the referral, and not part of the referrals' being the "object

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[170] *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 43, ¶ 94 (July 22).
[171] *See id.*
[172] *Id.*
[173] *See* U.N. Doc. S/PV.5158, *supra* note 27, at 11; U.N. Doc. S/PV.6491, *supra* note 49.
[174] *See* S.C. Res. 1593, *supra* note 4; S.C. Res. 1970, *supra* note 6.
[175] *See* Vienna Convention on the Law of Treaties art. 44, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].
[176] Cryer, *supra* note 14, at 214 ("After all, the Rome Statute sets out what it may do in the event that the [UNSC] refers a matter; that other aspects do not conform to its Statute would be likely to be held by the ICC to be a matter of supreme immateriality. The UN Secretary-General and the ICC have so far treated the reference as prima facie valid under Article 13(b)").

and purpose." [177] Taking the *Kosovo* approach, one may infer the separability of paragraph 6 based on VCLT Article 44(3), which provides that:

> If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where: (a) the said clauses are separable from the remainder of the treaty with regard to their application; (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and (c) continued performance of the remainder of the treaty would not be unjust.[178]

The most difficult aspect may be VCLT Article 14(3)(b). It may be argued that paragraph 6 was an essential basis for the U.S.' consent. Without such consent, it is debatable whether the UNSC would have adopted the resolutions at all, considering that paragraph 6 would have been void. That may be a strong argument for Resolution 1422 (2002), but that is not at issue here. For Resolution 1593 (2005), the argument is weaker, given that it is unclear whether it would have survived without paragraph 6. For 1970 (2011), it is even less clear. The facts of the matter are arguable.

Each of the above-mentioned substantive approaches to addressing the normative conflicts could be considered in assessing the validity of paragraph 6. However, this is still a novel and unresolved issue, and, at best, they provide some guidance by way of comparison and contrast. It is extremely unlikely that the ICC, an international legal organization, would suddenly find itself bound by paragraph 6. Yet, given the political dynamics involved and a rich history of a threatening U.S. foreign policy, one may never know.[179] Most importantly, the ICC, an organization, is not bound by

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[177] *See* VCLT, *supra* note 175, art. 31.
[178] *Id.* art. 44(3).
[179] The law often does not work out as lovely as we hope it will, and those who have studied law in the US should be quite aware of that. It is my opinion that even were the ICC to deal with the matter of paragraph 6 resolved, there are other legal and political hurdles that will sway the Court against any possibility of investigating and prosecuting members of certain States, such as the US. Afghanistan is one key example of this. *See, e.g.,* Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, Following Application for an Expedited Order Under Article 18(2) Seeking Authorisation to Resume

UNSC resolutions, except to the limited extent provided by the Rome Statute.[180] The ICC has its own international legal personality independent of the UN. Unless the ICC and States completely ignore paragraph 6, the ICC will likely entertain arguments pertaining to paragraph 6.

IV. MECHANISMS AVAILABLE FOR DEALING WITH PARAGRAPH 6

There are mechanisms that may be available should a situation arise that triggers paragraph 6. One consideration is the Assembly of States Parties (ASP) of the Rome Statute in dealing with the standing, unresolved dilemma. The ASP may consider passing a resolution, including language declaring its nonacceptance of paragraph 6, or integrating nonacceptance language into its "cooperation" resolutions. Such a resolution would allow State Parties authority to deny a request from the U.S. or other State to comply with a paragraph 6 request (or at least until the matter is resolved by the ICC). It is unlikely that the UNSC will make that demand on behalf of the U.S., although still possible if Resolution 1422 (2002) and *Lockerbie* are instructive.

Within the UN, however, the compromise behind previous resolutions was for different reasons. The history behind Resolution 1422 (2002) involved threats to end an entire peacekeeping mission in Bosnia and Herzegovina.[181] This evolved into a balance between peace and security interests versus the political interests of the veto-wielding State.[182] In absence of the UNSC's failure to exercise its primary responsibility in maintaining international peace and security, it may have been possible for

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Investigations in the Situation in Afghanistan (Sept. 27, 2021), https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application; Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, ICC-02/17-196, ¶ ¶ 33-34 (Oct. 31, 2022), https://www.icc-cpi.int/court-record/icc-02/17-196.

[180] *See generally* Rome Statute, *supra* note 15, arts. 13(b) & 16.

[181] *See* Zeidy, *supra* note 61.

[182] *See* U.N. Doc. S/PV.4568, *supra* note 55; U.N. Doc. S/PV.4568 (Resumption 1), *supra* note 74.

States to consider going through the UN General Assembly.[183] However, that would raise similar questions of interpretation regarding the Rome Statute Article 13(b).

Without prejudice to the view that language on "blanket immunities" has no legal weight, *reversing* the UNSC resolution (or particular provisions therein) is possible through passing another UNSC resolution negating paragraph 6.[184] However, this would be unlikely. Significantly, a number of States made their positions clear against each of the above-discussed resolutions. Therefore, there is some degree of State practice in this regard—also keeping in mind that those States voted in favor of, or abstained from, the resolutions. States may also exercise their political and diplomatic offices to challenge paragraph 6, such as in the forums provided to the ICC Prosecutor's regular reports to the UNSC on Darfur, Sudan and Libya.[185]

So far, the ICC has not dealt with a situation involving paragraph 6 and, given the years since the UNSC passed Resolutions 1593 (2005) and 1970 (2011), it does not seem likely that it will touch upon its validity until a given situation arises. [186] However, as discussed above, we have witnessed instances where the ICC Prosecutor considered the acts of members of NATO forces in Libya.[187] In evaluating the "now," the ICC Prosecutor may ask the Court for a ruling under Rome Statute Art. 19(3).[188] The Prosecutor has done so twice before, in seeking a ruling on a question of jurisdiction "whether the Court may exercise jurisdiction over the alleged deportation

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[183] *See* Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Rep. 151 (July 20). Of course, there are other issues at play, in particular redistribution of finances.
[184] For more on reversing UNSC resolutions, *see* Jean Galbraith, *Notes and Comments: Ending Security Council Resolutions*, 109 AM. J. INT'L L. 806, 811 (2015) (*citing* David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 578-82 (1993)).
[185] *See* S.C. Res. 1593, *supra* note 4, ¶ 8; S.C. Res. 1970, *supra* note 6, ¶ 7.
[186] See Zimmermann (2006), *supra* note 13, at 700 ("It remains to be seen how the Court itself, once seized with specific cases and issues, will eventually handle those issues.").
[187] *See supra* notes 96-100.
[188] *See* Rome Statute, *supra* note 15, art. 19(3) ("The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court").

of the Rohingya people from Myanmar to Bangladesh"[189] and on the Palestine situation.[190] Under Rome Statute Article 119(1), "[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court."[191] Here, there would clearly be a dispute between the UNSC and the ICC, or between States (both Parties and non-Parties to the Rome Statute). In reference to the situation of the Rohingya, the ICC Pre-Trial Chamber I explained that "[t]his provision has been interpreted as including questions related to the Court's jurisdiction."[192] The ICC added that it "has the power to determine the extent of its own jurisdiction."[193] Such a dispute would fall squarely within the competence of the ICC.[194]

To address the conflicts, some hypotheticals may be useful to illustrate. Consider if an arrest warrant has been issued against a suspect falling within paragraph 6 ("suspect"). The suspect is a U.S. national alleged to have committed war crimes in Libya in the context of the UNSC-mandated operations.[195] The suspect booked a flight from Libya to The Hague and walked into the ICC premises. The U.S. demands that the ICC send the suspect to the U.S. Would the ICC have to comply? What if, instead, the

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[189] *See* Decision on the "Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute," ICC-RoC46(3)-01/18-37 (Sept. 6, 2018), https://www.icc-cpi.int/court-record/icc-roc463-01/18-37.

[190] *See* Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine,' ICC-01/18-143 (Feb. 5, 2021), https://www.icc-cpi.int/court-record/icc-01/18-143.

[191] Rome Statute, *supra* note 15, art. 119(1).

[192] *See* ICC-RoC46(3)-01/18-37, *supra* note 189, at 11.

[193] *Id*. at 12 (citing Nottebohm (Liech. v. Guat.), Preliminary Objections, Judgment, 1953 I.C.J. Rep. 111, at 119 (Nov. 18)). This concerns the use of the *Kompetenz-Kompetenz* (*compétence de la compétence*) doctrine and would likely be used for the purposes of interpreting paragraph 6 and its applicability to both the ICC and States in terms of the cooperation.

[194] *See Commentary to Article 19 of the Rome Statute*, CLICC, LEXSITUS, https://cilrap-lexsitus.org/clicc/clicc/19/19; *See also Commentary to Article 119 of the Rome Statute*, CLICC, LEXSITUS, https://cilrap-lexsitus.org/en/clicc/119/119.

[195] There is also the question of whether the person is part of an "operation." This hypo, and the article generally, is more concerned with individuals that are considered to be part of an "operation." Zimmermann (2006), *supra* note 13, at 696 ["…it is also important to note that nationals of third parties that are *not current or former officials or form part of the personnel of a 'contributing State'* are *not exempted* from the Court's jurisdiction…several cumulative requirements must be fulfilled in order to trigger the exemption, namely that the person concerned possesses the nationality of a State not Party to the Rome Statute; that this State is a contributing State; and finally that he or she is or was an official of or forms or formed part of the personnel of this State."].

suspect booked a flight to Washington, DC and, in the airport, was detained by Libyan authorities? Would Libya have to surrender the suspect to the ICC? Let the suspect fly to DC?

What would be the respective obligations of States, or of the ICC? Rome Statute Article 86 provides the general obligation to cooperate in conjunction with the *pacta tertiis nec nocent* principle.[196] This applies only to States Parties.[197] Generally, the obligation to cooperate is not inherent within a referral. Rather, the referral itself must have also included language on the extent of cooperation with respect to the State, relating to the situation being referred (*e.g.* Sudan, Libya, or otherwise), and to UN member States, and to non-State Parties.[198] As far as State Parties are concerned, the obligation to cooperate remains by virtue of their Rome Statute treaty obligations.[199]

If the suspect happens to be in the custody of a State Party, that State is obligated to surrender the individual. What if the State Party fails? Rome Statute Article 87(7) allows the ICC to "make a finding to that effect and refer the matter to the [ASP] or, where the [UNSC] referred the matter to the Court, to the [UNSC]."[200] The Prosecutor will likely request such a finding, and the State Party will have the opportunity to respond.[201] If such a finding is made, the ICC may also refer the matter to the ASP, which may make a number of formal or informal actions in that regard.[202] Given that Libya, for example, was referred to the ICC Prosecutor by the UNSC, the

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[196] Meaning the treaty binds the parties and only the parties. *See* Zimmermann (2006), *supra* note 13, at 693 ("…codified in Art. 34 of the Vienna Convention on the Law of Treaties – only those States which are either contracting parties or which have entered into an *ad hoc*-arrangement with the Court are under an obligation to cooperate with the Court."). *See also* Zimmermann (2003), *supra* note 12, at 273.

[197] By virtue of international treaty law. *See Commentary to Article 86 of the Rome Statute*, CLICC, LEXSITUS, https://cilrap-lexsitus.org/en/clicc/86/86-state-parties.

[198] *See* Zimmermann (2006), *supra* note 13, at 693-95; *see also* S.C. Res. 1593, *supra* note 4, ¶ 2; S.C. Res. 1970, *supra* note 6, ¶ 5.

[199] *See* Zimmermann (2006), *supra* note 13, at 693-95.

[200] *See also* Rome Statute, *supra* note 15, art. 112(2)(f). That State may challenge the request vis-à-vis Rome Statute Article 119(1) on the basis that it conflicts with paragraph 6 and the Court will have to decide on the matter. *See also Commentary to Article 87(7) of the Rome Statute*, Lexsitus, CLICC, https://cilrap-lexsitus.org/en/clicc/87-7/87-7.

[201] *See id*.

[202] *See Commentary to Article 87(7) of the Rome Statute*, *supra* note 200; *see also* Res. ICC-ASP/10/Res.5, annex, ¶¶ 14-15 (Dec. 21, 2011).

ICC may also refer the matter to the UNSC for action.[203] UNSC action would be unlikely. If it did rule in favor of the warrant, it would mean the UNSC effectively ends paragraph 6. However, if it did rule in favor of paragraph 6's applicability, we are left with competing obligations. If the requested State was a non-State party, like nearby Egypt, it would be somewhat different, given the non-applicability of Rome Statute Article 86 (to a non-State Party). [204] Nevertheless, competing obligations would still exist between paragraph 6 and whether that State has an *obligation* to cooperate—just not like States Parties to the Rome Statute.[205]

Should there be competing requests between the ICC and the requesting State, Article 89(1) of the Rome Statute provides the obligation of States Parties to the Rome Statute to comply with a request for an arrest and surrender. [206] The remainder of Article 89 deals with the intricacies of honoring such a request.[207] It is different when a non-State party makes the request. As far as non-States Parties are concerned, we are left with Rome Statute Article 90. Rome Statute Article 90(4) provides that:

> If the requesting State is a State not Party to this Statute, the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.[208]

The competing requests should be viewed in tandem with the principle of complementarity. [209] At least as far as major powers like the U.S. are

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[203] Rome Statute, *supra* note 15, art. 87(7).
[204] Here, the UNSC is the direct source of obligation. *See* Akande (2012), s*upra* note 138, at 305.
[205] *See* Aloisi, *supra* note 14, at 151.
[206] S*ee* Rome Statute, *supra* note 15, art. 89(1).
[207] The request may be submitted to any State, but States Parties are obligated to comply with the request. The request is sent by the Prosecutor. *See Commentary to Article 89(1) of the Rome Statute: Transmittal,* CLICC, LEXSITUS, https://cilrap-lexsitus.org/en/clicc/89-1/89-1-the-court-may-transmit-a-request.
[208] *See* Rome Statute, *supra* note 15, art. 90.
[209] *See Commentary to Article 90 of the Rome Statute*, CLICC, LEXSITUS, https://cilrap-lexsitus.org/en/clicc/90/90.

concerned, there is a history of impunity for the alleged commission of international crimes.

Based on the competing requests (for the same conduct), Rome Article 90(1) provides that the requested State (if a State Party), must notify the ICC so that it may reconsider.[210] The ICC would have to determine that the case is admissible.[211] The key language here is whether there is "an international obligation." This concerns the availability of a bilateral or multilateral extradition treaty or other customary international law which might apply.[212] If, in fact, the case has not yet been deemed admissible, Rome Statute Article 90(5) provides that the requested State may proceed with the request for extradition.[213] Thus, for the requested State, it is best not to act until such an admissibility finding.[214] Pending no such decision, it is realistic that a State may extradite that person.[215]

Rome Statute Article 90(6) adds the following:

> In cases where paragraph 4 applies, except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:
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> (a) The respective dates of the requests;

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[210] *See Commentary to Article 90(1) of the Rome Statute*, CLICC, LEXSITUS, https://cilrap-lexsitus.org/en/clicc/90-1/90-1.
[211] *See* Rome Statute, *supra* note 15, art. 17.
[212] *See Commentary to Article 90(4) of the Rome Statute*, CLICC, LEXSITUS, https://cilrap-lexsitus.org/en/clicc/90-4/90-4 (*citing* WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 1302 (2d ed. 2016) [hereinafter SCHABAS]).
[213] S*ee* Rome Statute, *supra* note 15, art. 90(5).
[214] *See Commentary to Article 90(5) of the Rome Statute*, CLICC, LEXSITUS, https://cilrap-lexsitus.org/en/clicc/90-5/90-5 (*citing* JÖRG MEIßNER, DIE ZUSAMMENARBEIT MIT DEM INTERNATIONALEN STRAFGERICHTSHOF NACH DEM RÖMISCHEN STATUT 149 (2003) [hereinafter MEIßNER]; Claus Kreß & Kimberly Prost, *Article 88*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 2043-45 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016); Julien Cazala, *Article 90 – Demandes concurrentes*, *in* STATUT DE ROME DE LA COUR PENALE INTERNATIONALE VOL. II 1849–61 (Julian Fernandez et al. eds., 2012)).
[215] *See* Akande (2012), *supra* note 138, at 303.

> (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
>
> (c) The possibility of subsequent surrender between the Court and the requesting State.[216]

As some commentaries explain, "Meißner correctly remarks that the provision is meant to protect the requested State from breaching its international obligations vis-à-vis the requesting State and that the requested State's legal obligation towards a Non-States Party is independent of the admissibility assessment by the Court." [217] The commentaries add that "[t]his does not imply, however, that an (affirmative) admissibility decision by the Court has no effect on the application of Article 90(6)."[218] The reference to paragraph 4 indicates that paragraph 6 only applies to instances where the ICC "has already determined that the case is admissible."[219] Thus, while there would be a general obligation for States to cooperate (vis-à-vis the Rome Statute and UN Charter obligations), the ICC may consider whether paragraph 6 constitutes an existing international obligation. This obligation would be the basis for the State's request. The requested State is then given discretion to make a decision on that basis, based on the factors described. Thus, without a positive finding by the ICC, the requested State may be in limbo. If the requested State is a State Party to the Rome Statute, the obligation to cooperate with the ICC is clear. If it is a non-State Party, like Egypt, the obligation to cooperate is not so clear.[220] Libya, as the situation referred,

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[216] Rome Statute, *supra* note 15, art. 90(6).
[217] *See Commentary to Article 90(6) of the Rome Statute*, CLICC, LEXSITUS, https://cilrap-lexsitus.org/en/clicc/90-6/90-6 (*citing* MEIßNER, *supra* note 214, at 149).
[218] S*ee* Rome Statute, *supra* note 15, art. 90(6).
[219] *Commentary to Article 90(6) of the Rome Statute*, *supra* note 217 ("implicitly" citing SCHABAS, *supra* note 212, at 1302).
[220] *See* Akande (2012), *supra* note 138, at 309 ("the better view is that [UNSC] has implicitly adopted the regime of the Statute into the relevant [UNSC] resolutions. It is worth recalling that the words 'cooperate fully' in SC Res 1593 and 1970 mirror the obligations of cooperation in Article 86 of the ICC Statute.").

would be *required* to cooperate by virtue of the referral – not unlike Sudan.[221]

The ICC may make a finding of noncooperation of non-State Parties to the Rome Statute by virtue of the referrals. This has been done in the past. For example, Resolution 1970 (2011) paragraph 5 provides that "while recognizing that States not party to the Rome Statute have no obligation under the Statute, it urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor."[222] Yet, with non-State Party Mauritania, in its failure to arrest Libyan Abdullah Al-Senussi, the ICC found no obligation to cooperate.[223] Resolutions 1593 (2005) and 1970 (2011) simply *urge* States to cooperate.[224] Interestingly, the ICC explained that "[t]his principle may be altered by the [UNSC], which may, in accordance with the [UN Charter], impose an obligation to cooperate with the Court on those [ICC] Member States that are not parties to the Statute."[225] The language is somewhat problematic because it is separate from paragraph 6 and creates the possibility of altering a State's obligations – or at least those of a non-State Party.[226]

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[221] S.C. Res. 1970, *supra* note 6, ¶ 5 ("Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution…").

[222] *See Commentary to Article 90 of the Rome Statute, supra* note 209 (and sub-articles). *See also* Akande (2012), *supra* note 138.

[223] *See* Prosecutor v. Gaddafi & Al-Senussi, Case No.: ICC-01/11-01/11, Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council (Aug. 28, 2013), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013_05689.PDF.

[224] Further, as Zimmerman stresses, paragraph 2 of 1593 states that "States not party to the Rome Statute have no obligation under the Statute." Zimmermann (2006), *supra* note 13, at 689-91, 693-95.

[225] Prosecutor v. Gaddafi & Al-Senussi, Case No. ICC-01/11-01/11-420, Decision on the Request of the Defence of Abdullah Al-Senussi to Make a Finding of Non-Cooperation by the Islamic Republic of Mauritania and Refer the Matter to the Security Council, ¶ 12 (Aug. 28, 2013), https://www.icc-cpi.int/court-record/icc-01/11-01/11-420. *See also* Akande (2012), *supra* note 138, at 305.

[226] *See* Akande (2012), *supra* note 138, at 307 (the UNSC can in fact "impose obligations of cooperation on states that are greater than those contained in the ICC Statute" (*citing* Informal Expert Paper: Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation, 2003)). *See also* Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 J. INT'L CRIM. JUST. 590, 593 (2005) ("However, states not party to the Statute

As discussed in the previous section, one consideration is the ICC's ability to review the content of UNSC resolutions within the procedures outlined above. It would not be about challenging the actual referrals. The defense in the Libya cases, for example, attempted to challenge the admissibility of the UNSC referral, but based on a temporal argument. There, the defense requested that the UNSC referral and admissibility requirements be interpreted in light of the "fundamental change in context in Libya,"[227] where the Libyan government was overthrown and now able to investigate and prosecute. Unfortunately, the defense did not explore challenging the referral, in whole or in part, which may have touched upon the issue of paragraph 6.[228]

If any such situation reaches the ICC, one can assume paragraph 6's validity will likely be raised during the submissions process between the prosecution, defense, and judges. The defense would likely challenge admissibility based on paragraph 6's inclusion and thus it would be a matter addressed by the ICC.[229] Similarly, as Stahn notes, one may infer that the Court "is vested with the authority to refuse to implement a [UNSC] request that exceeds the limits of Article 16,"[230] which could similarly apply to paragraph 6. As explained with the caveats above, while States are bound for the most part by UN Charter Article 103, the ICC as an institution is not.[231]

Outside of the court system itself, it is also possible for the ICC Prosecutor to express its views on the matter beforehand. This could be done through its own documentation, such as annual reports. It could also be done through regular statements made to the UNSC, several years ongoing. However, it may also be implied that the OTP already leans towards the invalidity of paragraph 6, considering its initial looking at alleged crimes committed by NATO forces, and as raised by the UN Libya

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may also be brought under an international obligation to cooperate with the Court by 'any other appropriate basis" (*citing* Rome Statute art. 87(5)).

[227] Prosecutor v. Gaddafi & Al-Senussi, Case No. ICC-01/11-01/11, Application on behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, at 39-41 (May 1, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_05322.PDF.

[228] *See* Prosecutor v. Gaddafi & Al-Senussi, *supra* note 22.

[229] *See* Rome Statute, *supra* note 15, art. 19.

[230] Stahn, *supra* note 45, at 102.

[231] *See* Cryer, *supra* note 14, at 214.

commission of inquiry. At any stage, it may also be possible to look into an advisory opinion from the ICJ on the matter. This can be brought via Rome Statute Article 119(b).[232] Here, there must be a dispute between two or more States Parties and the dispute must be subject to negotiations.[233] A genuine dispute here may not actually exist, given that it is expected that most States—at least those States Parties to the Rome Statute—will agree with the view that paragraph 6 has no legal weight. Either way, it should be left for the ICC to assess when the situation arises. Another feasible option is for the UN General Assembly to seek an advisory opinion from the ICJ by way of Article 96(a) of the UN Charter.[234]

CONCLUSION

Overall, the misplaced language contained in paragraph 6 seems to be just that. It is obvious that at times of need, in the search for justice, accountability, and other ultimatums, States will agree to pass a UNSC resolution that includes a contentious provision. This leads to a view that the law is created in a context where the strong can find a means to exclude themselves from its purview.[235] It is my personal view that paragraph 6 should be given no legal weight by the ICC or by States' Parties to the Rome Statute. Nevertheless, pressure from a permanent UNSC member with veto powers would likely result in the need to address the problem. There is no apparent reason why the ICC should not tackle the matter, review paragraph 6, and—at least figuratively—delete it. There is some jurisprudence to work with to review the paragraph and its effects, but it is still a novel issue.

Hence, given the novel situation it presents, this article has explored several ways in how it can be addressed, and where. With respect to how it can be challenged (*i.e.* what approaches), some suggestions have been

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[232] *See Commentary to Article 119(2) of the Rome Statute*, CLICC, LEXSITUS, https://cilrap-lexsitus.org/en/clicc/119-2/119-2.
[233] *Id.*
[234] Keeping in mind that ICJ Advisory Opinions are non-binding. *See* Deen-Racsmány, *supra* note 61, at 386.
[235] *See* Cryer, *supra* note 14, at 218-21.

made, including looking at cases where issues of primacy and judicial review have been addressed in the ICJ, the ECJ, and international criminal tribunals. In many ways, we have seen that primacy (in the case of UNSC resolutions) is the rule, but there are exceptions. Further, there are possibilities in terms of judicial review over UNSC decisions or, at the least, the effects of those decisions. Moreover, with respect to where paragraph 6 can be challenged, some suggestions have been made. As of now, the Prosecutor has largely avoided any situation that would deal with paragraph 6. The Prosecutor, as such, would be the most likely challenge. This would also draw in the defense in specific cases as well. As such, the most appropriate venue for challenging paragraph 6 would be judicial, coming from the ICC itself. The ICJ may also have a role if such a dispute still exists after the ICC has looked at it. However, there is also a role for States Parties to the Rome Statute, either individually or through the ASP. It is important to assess these needs before another referral surfaces, so that the same predicament does not reoccur, as it did in the failed referral of the situation in Syria. It is clear that the attempts to interpret the UNSC's powers, coupled with its foreign policy clout, vis-à-vis the UN Charter and the Rome Statute, have been way beyond what is in the text.