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## **5.2.0. Conclusions:**

### **5.2.1. The Referral Regime:**

The Rome Statute allows the UNSC to bring situations to the attention of the ICC Prosecutor for possible investigation and prosecution. The referral regime is couched in terms that disguise the grip of the UNSC on a court that requires independence and legitimacy. As one arm of the relationship, the referral regime casts amounts of doubt on the status of the court as an independent international criminal court capable of making its own decisions and choices.

The UNSC mandated by chapter VII of the UN Charter wields immense powers to the extent that its referral of a situation to the ICC is a criminal charge in disguise. The court does not have much to do but find a few suspects to try as failure of the same will reverberate back to the UNSC and show its decision for referral as tainted with bad faith. In simple terms, the referral is a command in disguise. It therefore robs the court of the vital element of independence and discretion. Lack of these elements renders the court redundant in a world where everyone is watchful of the works of the court, not to mention the suspicion surrounding the same.

The referral regime however has an advantage because it affords the court criminal jurisdiction outside the scope of article 12 of the Rome Statute. This is vital to the work of the court as discussed above.

### 5.2.3. The Deferral Regime:

The second arm of the UNSC/ICC relationship is the deferral regime. Under this arm, the UNSC has powers to halt proceedings at the Court. Investigations and prosecutions can be stopped before and after they are commenced. This is therefore the arm that wields immense power and in the end the most devastating to the independence and legitimacy of the court as a judicial body.

There are several problems with this regime. Firstly, all the UNSC does is pass a resolution and the court on its own motion stops the proceedings. It has neither choice nor say on the reason forwarded by the UNSC. This is an erosion of the court's independence and discretion. Secondly the request is a command in disguise. The UNSC just decides and the court obeys. This is an erosion of the court's legitimacy as a truly judicial body and portrays the court as a political tool in the hands of the representatively imbalanced UNSC. Thirdly, the regime may perpetrate impunity in an era where there is no such option for the crimes falling under the jurisdiction of the ICC. The UNSC may halt prosecutions which are now believed to be the international threshold for dealing with serious atrocities as envisaged in the Rome Statute. This is counterproductive in the light of the strides made in the quest to rid the world of atrocities that offend all humanity.

Despite the above minuses, the deferral regime may achieve some good ends. It may promote the application of local remedies to the atrocities. These may be essential for lasting peace. A good example may be the call for deferral for the Joseph Kony prosecution and the introduction of the *mato oput*<sup>151</sup> practice of the

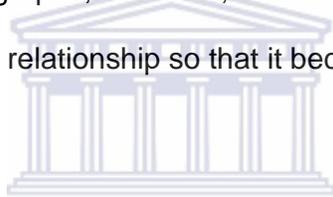
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<sup>151</sup> *Mato Oput* literally means "drinking the bitter root of an *oput* tree". Oketta says it symbolizes the end to a bitter relationship between two clan communities or families of offenders and the offended. See *Acholi want more prominent role for Mato Oput*. Accessed on 19 October 2009 at

local Ugandan people. Some have argued that this is the only way to peace that lasts in Uganda<sup>152</sup>.

### **5.3.0. Recommendations:**

In the light of the above discussed conclusions, it is arguable that the relationship between the ICC and the UNSC allows a threatening level of interference into the court's work, all under the guise of keeping and maintaining international peace. Judicial independence is compromised and international legitimacy of the court is in dire straits. The relationship further leaves the court vulnerable to politicisation by the UNSC. These are the compelling reasons for the relationship to be tamed or improved. The following paragraphs, therefore, summarise several ways of taming and improving the UNSC/ICC relationship so that it becomes more useful and satisfactory.



### **5.3.1. The Referral Regime:**

The UNSC is probably the most powerful political body in the world. It wields immense influence in the realm of international politics to an extent that it may be said to be the core of the United Nations. It therefore follows that the court benefits a lot by relating with such a body. When the UNSC makes a referral, however, it should not make it in situations where the prosecutor or state parties acting on their

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<<http://www.ugpulse.com/articles/daily/Heritage.asp?about=Acholi+want+more+prominent+role+for+Mato+Oput&ID=1025>>

<sup>152</sup> Barney Afako (2002) states that:

"The unacceptably high costs of civil war have caused Ugandans to re-assess approaches to resolving conflict. Among the Acholi of northern Uganda, the bitter experience of unending conflict has generated a remarkable commitment to reconciliation and a peaceful settlement of the conflict rather than calling for retribution against the perpetrators of serious abuses... This call for amnesty was underpinned by their faith in the capacity of the community and cultural institutions to manage effective reconciliation even against the background of serious offences". See *Joseph Yav Katshung 'Mato Oput versus the International Criminal Court (ICC) In Uganda'*. Available at Pan African Voices for Freedom and Justice –Pambazuka News, <<http://www.pambazuka.org/en/category/comment/37403>>

own would move. The Referral power of the UNSC should therefore be a *reserve jurisdiction* mechanism and used for the purposes of awarding the court with jurisdiction only. The referral therefore should be a grant of jurisdiction and not a placement of a situation in the court machinery as the current set up allows.

To facilitate the above suggestion, article 13 of the Rome Statute needs to be amended so that it can arrange the trigger mechanisms in order of priority. This should not be priority of importance but priority of use. This will be in line with the principle of complementarity. It is the state party to the statute that has primacy over trying the Rome Statute crimes. The state is seconded by the ICC Prosecutor who acts where the state is either unwilling or unable. The Prosecutor also acts on his own initiative. The third should be the UNSC referral. It should only be unleashed where the State has not or cannot act and the prosecutor cannot act due to lack of jurisdiction. This is advantageous to the ICC's International image as the reasons for the UNSC referring the situation will be only to award the court with jurisdiction and nothing else.

### **5.3.2. The Deferral Regime:**

The ICC, as the judicial institution that it is, demands independence. This may be manifest in the non-interference of its processes by any other external body, the UNSC inclusive. The deferral regime which allows the UNSC to halt investigations and prosecutions runs counter to this ideal. The UNSC should therefore only be allowed to stop investigations and for a definite period. This is contrary to the current situation where the UNSC can defer the investigations and prosecutions for indefinite periods of 12 months a piece. The above should also apply to prosecutions before they are commenced. Once prosecutions are commenced the UNSC should be

incapable of halting the same by a mere passing of a resolution. If national court practice is anything to go by, the executive branch of the government, which may be likened to the UNSC, cannot just decide in cabinet to halt on-going prosecutions. The normal practice is to apply to the court for an adjournment or continuance. This practice is entrenched in the deep respect for the judicial nature of the courts. It also manifests the independence of the judiciary as it is able to decide on the adjournment or continuance. The same practice should be applied at the ICC. The UNSC should request the ICC Prosecutor to file an application/motion for deferral. The court should be allowed to decide whether to grant it or not. In this way judicial independence will be encouraged. Therefore this paper calls for the amendment of article 16 of the Rome Statute so that it reflects the above suggestions.



## 6.0. EPILOGUE

The UNSC/ICC relationship is an opportunity for both success and failure of the ICC. As a new body on the international plane, the ICC needs to amass legitimacy and independence if it is to gain respect and cooperation. It ought to be an independent international body achieving its objectives as outlined under the Rome Statute. It is not for the ICC to help the UNSC foster its political objectives. Rather it is the UNSC that should foster the objectives of the ICC by awarding it jurisdiction and letting it be independent. The ICC's involvement with the UNSC should, therefore, not be allowed to derail the good intentions of the framers of the Rome Statute.

**Word Count: 11, 827.**



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