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The Politicisation of International Criminal Justice: An Exploratory Analysis of the UN Security Council's Case Referral of Libya to the ICC
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International Law, Use of Force, and
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*The Politicisation of International Criminal Justice: An Exploratory Analysis
of the UN Security Council's Case Referral of Libya to the ICC*

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Introduction

Since the beginning of the twenty-first century, human rights movements have become synonymous with the battle against impunity (Engle, 2015). After much discussion and negotiation between sovereign states, the International Criminal Court (ICC) was established with the Rome Statute in 2002 as an independent institution with the aim of prosecuting individuals who orchestrated serious crimes against humanity, acts of aggression, genocide and war crimes. It led the way for the recognition of a global anti-impunity norm which is determined to end amnesty for the “perpetrator of international crimes and thus to contribute to the prevention of these crimes” (Bergsmo & Buis, 2019, p. 247). While the ICC strives to act independently, scholars and lawyers alike have criticised its vulnerability to political influences. In particular, it is the authority of the United Nations Security Council (UNSC) to refer cases to the ICC that has generated extensive debate on the legitimacy, efficiency and independence of the institution, thereby questioning the ICC’s ability to end the culture of impunity.

Over the last decade, the concept of politicisation has been increasingly discussed and researched by political scientists. Undoubtedly, political objectives are always a matter of concern in intergovernmental organisations such as the UNSC--the loyalty of state representatives will inevitably lie with their own national interests rather than the UN; however, the intrusion of political interests should not be to an extent that it undermines the mandate of the UNSC which is primarily to maintain international peace and justice. Certainly politics plays a role in decision-making, however, detrimental politicisation only occurs when states introduce and pursue objectives that are unrelated and controversial, hence, undermining the mandate. Politicisation poses significant challenges to combating impunity, therefore questioning the future of international criminal justice, specifically whether the ICC is simply a political tool serving selective justice.

To date, the UNSC has only referred two cases to the ICC, Darfur in 2005 and Libya in 2011. Both cases have raised significant questions on the process and criteria with which these cases were referred. In addition, the cases that did not receive support from the permanent members (P5) are equally significant to this debate. Therefore, this thesis aims to investigate, *To what extent did the United Nations Security Council use the International Criminal Court as a political tool through the case referral of Libya in 2011?* In adoption

of the realist perspective of IR, this thesis presents a two-fold argument; it is argued that the case referral of Libya in 2011 was an increasingly politicised decision wherein the possibility of a regime change was welcomed. Secondly, the politicisation of case referrals to the ICC could pose significant challenges to international criminal justice by weakening the anti-impunity norm and harming its legitimacy. The ability of the UNSC to intervene in the ICC's jurisdiction represents a significant challenge to combating impunity and serving international criminal justice.

This thesis attempts to provide a deeper understanding of the extent of politicization of issues of peace and justice, thereby questioning the integrity of both institutions and what this means for the international justice system. The question of peace and justice is increasingly relevant in a time where serious crimes against humanity are taking place all around the world, without accountability.

Politicisation has been determined as a serious challenge to the purpose of international criminal justice, which this thesis aims to explore. Part I provides a framework discussing existing literature on the concept of politicisation, theories of justice and a discussion of the realist perspective of IR. Part II describes the methodology and research design used to investigate the research question, Part III entails the results and analysis, and Part IV ends in the discussion and conclusion of the findings.

1. Literature and Theoretical Framework

1.1 Theories of Politicisation

Like most conceptual definitions in political science academia, there is much contestation and variation on the empirical and normative utility of politicisation, resulting in a range of ways the term can be used and analysed. For one, politicisation has been defined as the pursuit of political objectives through instruments of jurisprudence and public criticism, and resistance against the legitimacy of international institutions (Binder, 2008). Hartwell (1979) stated that “politicization serves as a description of the process of making all questions political questions, all issues political issues, all values political values and all decisions political decisions” (Hartwell, 1979, p. 14). On the other hand, the functionalist definition of politicisation is based on the notion that collaboration between economic, social and technical spheres, results in better cooperation in the political sphere (Lyons et al, 1977). In this sense, specialised agencies such as the ILO or IMO which are meant to be functional are often criticised in terms of the degree of politicisation of issues. The UNSC’s primary responsibility is to maintain peace and justice on issues considered as ‘high politics’, which a functionalist would argue is a highly politicised institution.

Another view sees politicisation as the pursuit of political objectives in non-political arenas, however literature does not specify what political objectives consist of. Would an economic or foreign policy interest be considered a political objective? There is no clear distinction between the two labels, as political objectives are usually an overlap of different interests. Lyons et al (1977) argue that organisations become extremely politicised when both their structure and existence become controversial.

The constant debate on the need for UN reforms, specifically curbing veto powers of the P5 in the UNSC, is indicative of the controversial nature of the Council itself. For the interest of this research paper, politicisation will be defined as the degree to which certain decisions are characterised by controversy, through the introduction of unrelated controversial issues by member states of the UNSC.

Looking at the politicisation of the UNSC itself, Debidatta Mahapatra (2016) argued that the P5 members are an obstacle to the equal application of peace and security. As stated in her research, the clash in interests hampered efforts for peace in Syria while the lack of clash in Mali allowed for action. In this manner, the ICC has been illustrated as playing the

role of two courts by the authors, Fletcher & Ohlin (2006). They argued that when acting on UNSC case referrals, the ICC becomes a judicial organ of the UN funded by the UN. Depending on the origin of the case, the ICC either acts as an independent court or becomes an instrument to achieve political objectives (Fletcher & Ohlin, 2006). This is also evident in the features of the case referrals: limited mandated state cooperation, exclusion of financial responsibility for investigations and exclusion of jurisdiction over non state parties (Adejoke Babington-Ashaye, 2014). It is argued that these features allow the protection of US interests, thus limiting the scope of the ICC. As a consequence, Alana Tiemessen (2014), argues that case referrals by the UNSC and by states, lead to one-sided prosecutions that result in dangerous impunity-gaps. Her research is significant to this debate as it provides an insight into the instrumentalisation of case referrals.

Followingly, another consequence of politicisation is that the goal of ending impunity will not be achieved without the acknowledgement of the political interference by the UNSC (Nadia Ali, 2019). Ali (2019) states that the ICC is a political coercion tool at best, as reflected in the concerns of the African Union and the case of Sudan which was referred by the UNSC. The arrest warrant issued against Sudan's President Al-Bashir became a debate on the bias of the ICC towards Africa. Ali (2019) argues that the unconstrained veto powers of the P5 has resulted in a hierarchy of sovereignties where only certain crimes are referred based on whether or not they have an ally in the Security Council (Ali, 2019).

Thus, there is also literature focusing on the perspective of the AU, arguing that the UNSC has failed to apply the referral and deferral rule equally. In particular, it has been selective in the waiver and recognition of immunities for international crimes based on the interests of permanent members (Asaala, 2017). Furthermore, Asaala (2017) argues that this has impacted the African perception towards the ICC, thereby affecting its legitimacy. The legitimacy of the ICC poses a significant challenge for the international community, which originates from theories of justice, notably the 'peace vs justice' debate discussed below.

1.2 Theories of Justice

Steven Roach (2013) argues that the legitimacy of the ICC can be preserved through ‘negotiated justice’ even if political ideas are embedded in the Rome Statute. Hence, whether or not the legitimacy of the ICC is a consequence of politicisation is a relevant question to examine as it would determine the significance of the role of the ICC in the future. Roach (2013) states that it is the ICC’s assertive justice that enables its legitimacy, especially in Africa where it is seen as arbitrary. Furthermore, it is suggested that the ICC should use political interests to increase cooperation from states, rather than being used by them (Roach, 2013). This is certainly an area of exploration, however it must be reasoned whether the idea of negotiated justice suggested by Roach (2013) will risk making the ICC more political rather than judicial.

In examination of the referral of Libya in 2011, Peskin & Boduszynski (2016) argue against the concept of “justice cascade” introduced by Kathryn Sikkink, which states that there is newfound legitimacy for the anti-impunity norm toward state officials (Peskin & Boduszynski, 2016, p. 273). It was observed that international support for ICC prosecution in Libya changed with shifting political circumstances, raising the question of whether the ICC is, in fact, a mere political tool. Unlike Darfur, there was much less international dependence on the Libyan leader, and NATO had launched a coalition against the government. Peskin & Boduszynski (2016) argue that while these conditions enabled unity and support within the international community, they were not sustained.

International support for the case referral of Libya began to falter when talks of exiling Gaddafi came into fruition. It was reported that Uganda, an ICC state party, and the UK had offered him exile. Evidently, the international community was more focused on finding a resolution to the conflict rather than seeking criminal accountability.

Another significant argument raised was the fact that an investigation was only opened by the office of the prosecutor after the case was referred to the ICC. Hence, the ICC did not have an assessment of the crimes committed before the resolution of Libya was passed, indicating political interests as the motive behind a steadfast decision in the Council. This has been further conceptualised by Tim Murithi (2019) who argues for the concept of judicial imperialism. In the first decade of the ICC, a biased prosecutorial approach was observed as Africa was the only continent receiving ICC rulings. Murithi (2019) argues that

the ICC was being used as a political tool by the global powers in the UNSC to essentially control and dominate individuals who were not their allies (Murithi, 2019).

The theories discussed above, all come down to the peace vs justice debate in the realm of international criminal justice. The dilemma is whether peace agreements and negotiations with perpetrators of international crimes actually serve justice or are justified. Some scholars argue that peace agreements are essential in maintaining and consolidating peace, while others argue the opposite. On one hand, the politicisation of the ICC is seen as selective justice, but on the other hand it is seen as an existing consequence of a realist international system.

1.3 Realist Approach in IR

In the 1970s, scholars discovered a newfound interest in realism, which in time led to the formulation of a neo-realist approach to international relations. Realism essentially argues against the possibility of effecting dramatic change in the international system. According to them, the many forces shaping the international system are unchangeable and there is no harmony of interests between states. As a result, conflicting national interests and objectives is what may lead to war (Tiemessen, 2014). Mainstream IR scholarship views the politicisation of international institutions mainly as a display of international hierarchy and authority. In fact, political realists are highly skeptical of international institutions and see them as the means to realise political ambitions and self-interests of states. From a realist perspective it can be argued that states would be reluctant to hold other states accountable for violating international law due to the fear of being subjected to the same treatment.

While the liberalist approach in IR tends to agree with realists on states being the main actors and on the rationality of mankind, they also believe in human goodwill and progress through collective institutions (Shciff, 2008). Neoliberal Institutional Theorists come closer to the realist approach in IR, by combining liberalism and realism. They argue that while states are the primary international actors, they can be motivated to cooperate with other states for their own welfare and absolute gain (Shiff, 2008). In explanation of the role of the ICC, neoliberal institutionalists argue that organisations and states affect each other and states will support cooperation if they seek to gain from it. In accordance, if cooperation hurts their interests, they will oppose or constrain from it. Therefore, states will choose to cooperate and support the ICC in combating impunity if it aligns with their own normative

objective (Shiff, 2008). Similarly, for liberal institutionalists, the legitimacy and autonomy of the ICC increases, the more they serve state interests (Shiff, 2008).

However, the institutional structure of the ICC and the UNSC, closely resembles a realist perspective due to their vulnerability to the intrusion of geopolitical interests (Tiemessen, 2014). By implication, realism argues that the UNSC would use the ICC as a political tool. As discussed before, the P5 member states were concerned that their powers would be restricted by the introduction of an international court. It was only with the powers mandated by the Rome Statute, that there was support for the ICC. Additionally, it must be noted that China, Russia and the US are not state parties to the Rome Statute and yet they possess considerable influence over the process of case referrals to the ICC. Critics argue that this is a problematic double standard that poses great risks to the legitimacy of the ICC, while optimists such as Roach (2013), argues that the ICC nonetheless has been able to deter impunity for crimes against humanity.

More significantly, the realist theory discusses the concept of power in the international system. Realism posits that states are the main actors who are constantly pursuing self-interests which themselves are defined by power. This results in increased conflict due to a clash in state interests (Shiff, 2008). A state therefore, is constantly battling for power in the international system (Shiff, 2008). However, the rise of international cooperation on economic and security interests as well as the emergence of international organisations, led to the introduction of neo-realism. Neo-realists such as Morgenthau (2017) still consider power as an important element, however they see it as not an end but as an inevitable part of political relationships between states (Morgenthau, 2017, p. 127).

Furthermore, Robert Giplin (1983) argues that states indulge in a cost benefit analysis about courses of action that are available to them. Due to this, self-interest rather than morality prevails when assessing a plan of action. Hence, unless morality becomes the means to achieving an end, it is unlikely that it will trump self-interest (Giplin, 1983, p. 51). This explains the US invasion of Iraq or Afghanistan for instance.

Similarly, in his book, "Building the International Criminal Court", Benjamin Shiff (2008) explains that for realists international organisations are viewed as tools for states to compete for power, rather than an escape from anarchy. Thus, it would be irrational for states to give up on their sovereignty to enforce international law combating impunity, unless it

produces relative gains (Shiff, 2008). This explains why states would want to restrict the Court's powers against their own.

The UNSC reflects the international system and the conflict of different national interests. With the existence of the P5 there is power stability in the system, and the demand to democratise the UNSC would only disturb this equilibrium and increase conflict and uncertainty. The reasons with which states agreed to refer the case of Libya to the ICC will certainly reveal whether their own political interest and motivations were being achieved, whether it was a moral decision or whether there were external pressures to this decision. This thesis adopts a realist perspective of politicisation which will be analysed from the case study analysis of Libya, the reaction of the ICC, and compared to the failed resolution on Syria.

2. Research Design

2.1 Methodology

This research will attempt to examine the debates at the Security Council, the arguments presented by member states and analyse the way they justified a decision to refer Libya to the ICC as well as the relevant resolution. Hence, qualitative exploratory research is deemed as an appropriate methodology for this investigation as it will enable a holistic analysis of the role of politicisation in the referral of Libya. More specifically, the ‘limited exploration’ approach will be employed as it entails “searching systematically for something in particular” which is known to exist (Stebbins, 2003, p. 3).

Qualitative exploratory analysis will help locate politicisation in a larger conditional framer or context in which it is embedded and describe the process of it, through reactions and interactions between actors. Furthermore, such an analysis will allow for the identification of possible consequences such as legitimacy and the diminishing of the anti-impunity norm (Corbin & Strauss, 2008). The purpose of exploratory analysis in this thesis is to move closer towards a clearer understanding of politicisation. In order to gain a deeper perspective, the qualitative research strategy of constant comparison will be used. Constant comparison is defined as “the analytic process of comparing different pieces of data for similarities and differences”, which will be valuable in answering whether or not the Libyan case was used as a political tool, as opposed to the case of Syria, which was not referred to the ICC (Corbin & Strauss, 2008, p. 74).

Hence, the case of Libya will be constantly compared to the case of Syria, although the focus of this research is placed on the case study analysis of Libya. The disadvantage of this method is the reflection of potential bias by the researcher, difficulty in interpretation and its focus on discourse. Certainly, member states tend to be diplomatic and non-transparent when issuing official statements. Hence, it could be problematic to rely only on text. A solution would be to incorporate a variety of data sources such as press statements, documents and reports in order to discover a pattern of thought, which this thesis aims to do in its own capacity.

2.2 Case Selection

This thesis will examine the case referral of Libya to the ICC, as it is more recent and therefore could highlight contemporary challenges to international criminal justice.

In February 2011, civilians gathered on the streets to protest against the 41 year reign of Libyan leader, Muammar Gaddafi. Demanding an end to his rule, protesters found themselves as victims of consistent and grave mass atrocities at the hands of the Libyan armed forces. Gaddafi rose to power in 1969 following a coup d'etat, exercising an unruly government that did not tolerate dissent and that was run by his family and close associates (Terry, 2015). The string of protests as part of the Arab Spring, created great unrest across Libya. While anti-government forces began to occupy parts of the country, Gaddafi remained defiant and was prepared to resort to 'slaughter' to save his regime (Terry, 2015).

The violence against civilians garnered international attention from the African Union, Arab League and the Human Rights Council. This placed extensive pressure on the Security Council to assess the situation as Libya itself is not party to the Rome Statute, and could not have been pursued by the ICC directly. On February 26, the UNSC unanimously passed Resolution 1970, demanding an end to the violence against civilians in Libya and taking the measure of referring the case to the ICC (Terry, 2015). Additionally, sanctions including an arms embargo, travel ban and asset freeze was imposed for the regime's inner circle (Terry, 2015).

Although it was considered the right move, questions were raised on the motivation behind the case referral because it is not often that the Security Council takes this step. This was therefore viewed as a political decision rather than a legal one, since many pertinent cases such as the human rights violations in Syria were being overlooked. The case of Syria will be used as a measure of comparison, to locate the differences in positions, reactions and statements and identify a pattern of politicisation.

2.3 Data Selection

In order to capture the existence of politicisation through an exploratory analysis, this research will rely on primary sources such as official reports published by the Security Council on the matter of Libya and Syria, the relevant resolutions and statements made by the ICC, regarding the referral of Libya. There are exactly 17 published reports on meetings concerning Libya between 24 March and 22 December in 2011, found in the UN archives.

However, only three of them consist of statements made by Council members regarding the case referral of Libya in 2011. Since the resolution on Libya was adopted within two Council meetings, the analysis will focus on debates prior to and post the adoption of Resolution 1970.

Resolution 1970 was adopted unanimously by the UNSC on 26 February 2011, expressing grave concern for the human rights violations taking place in Libya at the hands of the Libyan government. It took the measure of referring Libya to the UCC, imposing an arms embargo, a travel ban and the freezing of assets. Unfortunately, there is no access to the Council Meeting that took place on 22 February as it was a closed session. Hence, in order to gain a deeper understanding, the findings will be compared to the failed resolution on Syria in May 2014. Specifically, the justification provided by the P5 for the referral of Libya and non-referral of Syria. This data will be obtained from the archives of UN.org and securitycouncilreport.org. In addition, the reaction of the ICC will be taken into account through the official statements made by the ICC regarding the referral of Libya by the Security Council. The reaction of the ICC will reveal whether this decision was controversial to any extent, and therefore politicised.

2.4 Operationalisation

In this thesis, politicisation has been defined as the introduction of unrelated controversial issues into the Security Council during the sessions and meetings on the cases of Libya and Syria. In accordance with the literature and conceptual framework, this thesis has formulated the following hypothesis:

The United Nations Security Council case referral of Libya in 2011 was an imbalanced and controversial strategy targeted at the ruling elite in Libya for political aims and interests.

The hypothesis implies the political nature of the case referral, UNSC's motivation and the manner in which the mandate of the Council is undermined, as a consequence. According to contemporary literature, the case referral of Libya was controversial and political because it was referred prior to a complete investigation. Furthermore, it is suggested that since none of the member states had alliances with the Libyan government, there was no inclination to veto

the decision. This thesis adds to existing literature by hypothesizing that the case referral of Libya was a political act to curb the ruling government which was in the interest of the P5. Furthermore, the absence of conflicting national interests enabled the UNSC to use the Libyan case as a ploy to improve their damaged legitimacy and credibility.

In this hypothesis the unit of analysis is politicisation, which will be measured using four indicators developed from existing literature: (1) *Is there evidence of conflict and analysis and human rights assessment?* (2) *Is there evidence of contestation or pressure from external actors?* (3) assessing the legitimate global governance criteria (*accountability and procedural fairness*) and (4) *the securitization of issues concerning the Libyan case referral* (Binder 2008). The chosen indicators will provide a holistic analysis of the debates in the Security Council, covering each aspect that can prove controversial and therefore undermine the mandate of the UNSC, which includes the promotion of respect for human rights and the maintenance of international peace and security.

The first indicator, assessment of human rights situation, denotes to what extent the violation of human rights in Libya is examined and not simply referenced to, in the statements of Council members. The lower the engagement with human rights discourse as a justification to refer the Libyan case to the ICC, the higher the pursuit of other unrelated interests. Thus, demonstrating politicisation.

The second indicator, contestation or pressure from external actors, denotes the existence of controversy or criticism from external actors or the international community, which will indicate whether the inclination to vote for Resolution 1970 was driven by national interests such as improving legitimacy and credibility. Resolution 1970 was drafted and proposed by France, the United Kingdom, Germany and the United States and unanimously adopted in Council on 26 February 2011. The Resolution imposed sanctions on Libya, including an arms embargo, asset freeze and travel ban for the Libyan regime's inner circle (Lynch, 2011).

The third indicator, Global Governance Index (GDI), which is commonly used to assess the standard of governance of international organisations, will be applied to the Council debate on Libya. The concept of global governance was discussed by the author, Ngaire Woods (1999) in her book, "Global Governance" where she frames an understanding of the concept in relation to international institutions. Woods (1999) conceptualises it using three key principles: participation, accountability and fairness. In terms of participation, it is

common knowledge that membership to the UNSC, excluding the P5, is rotational and limited to 15 delegations. Hence, the analysis will focus only on accountability and fairness. Woods (1999) defines participation as the involvement of affected actors in discussion, accountability as member states explaining and justifying their position transparently and finally, the principle of procedural fairness which entails both procedural and substantive fairness (Woods, 1999). Procedural fairness requires the process of decision-making and enforcement of measures to be consistent, specified, clear and predictable. It denotes whether there is reference to the application of the appropriate procedures and methods and whether there is evidence of consistency in positions taken by the P5 (Woods, 1999). Overall, the GGI aims to indicate the standard of governance of the debates in the Council. The higher the Council meetings on Libya perform on accountability and fairness, the lower the evidence of politicisation of the Libyan case.

Lastly, the securitization indicator was selected to identify dialogues or statements alluding to national interests and therefore, reflecting a degree of politicisation. In international relations theory, securitization refers to the “process of turning an issue into a matter of security” (Gordon, 2019, p.8). A security threat stipulates a direct and significant threat to a state or its people. However, the wrongful framing of an issue as a security threat results in a security response and the unnecessary deployment of drastic measures, undermining legitimacy and effective coordination (Gordon, 2019).

3. Results and Analysis

Table 1 presents the findings gathered from assessing the data on Libya from the 6491st, 6647th and the 6528th Security Council Meeting which commenced with a progress report on Libya, from the Office of the Prosecutor of the ICC. Furthermore, the outcomes of Resolution 1970 which entailed the imposition of sanctions and the case referral of Libya to the ICC, will be briefly discussed. Table 2 presents the data obtained from the meeting on the failed resolution of Syria. This data was then further analysed, examined and compared to Libya in order to create a deep understanding of the findings. Finally, the official statement published by the ICC immediately after the case referral of Libya is discussed and analysed in reference to Table 1 and 2.

3.1 Politicisation of Case Referral Decision on Libya by the Permanent Members

The findings from Table 1 revealed evidence of politicisation in certain instances. Firstly, in examination of whether the permanent members addressed human rights violations in Libya, it was found that there was sufficient level of examination and judgement toward the crimes being perpetrated in the statements of the P5. However, the discourse was more general and broad, (“Today’s resolution demands an immediate end to violence and repression, full respect for human rights and international law”), rather than specifically examining the seriousness of the situation (UNSC 6491, 2011). Member states consistently expressed their condemnation and concern but did not determine the specific atrocities conducted. However, given that the Meetings were commenced with a statement by the Office of Prosecutor of the ICC, Mr. Moreno Ocampo, member states may have deemed it more appropriate to react to that, rather than reiterate the crimes conducted. Secondly, the meetings took place after the adoption of Resolution 1970, which entails the case referral of Libya to the ICC and the imposition of an arms embargo, asset freeze and travel ban for the regime’s inner circle (Terry, 2019). Thus, it should be considered that the gravity of the situation was debated or discussed in the informal sessions. Considering that the Council functions on consensus decision-making, it should be noted that in most cases, positions have been decided prior to meetings through informal exchange of views.

In terms of identifying evidence of pressure from external actors, the statements of the P5 did not directly refer to criticism toward the UNSC from other political or civil actors, however a number of statements made reference to the (“international community”) which is

indicative of the fact that member states were aware of allegations of the weak legitimacy and credibility of the Council (UNSC 6491, 2011).

Secondly, the standard of governance of the Council meetings concerning Libya revealed that while the statements of the P5 reflected accountability, there was limited evidence of procedural fairness. For instance, while a number of member states demonstrated consistency in how they justified the case referral of Libya by expressing their dedication toward combating impunity or simply stating their unchanged apprehension towards the ICC, such as China, there was no acknowledgement to a particular criteria or standard of procedure that the Libyan case could be measured against. In this case, the lack of reference to investigations, reports or data from human rights agencies or the ICC itself, demonstrates low procedural fairness. This is significant because in comparison to Libya, the UNSC only referred Darfur to the ICC two years after the armed conflict began and after “making note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur” (International Criminal Court, 2005). Furthermore, while the US was transparent in their assessment of the Libyan situation, there is a double standard when countries such as the United States demonstrate its full support for the ICC but are not party to the Rome Statute. The US position on Libya contradicts their general attitude towards the ICC, specifically when they refer to the importance of it “to support the Libyan people’s universal rights.”(UNSC 6941, 2011).

In terms of accountability, which aimed to examine whether the permanent members were transparent with their positions and provided an explanation and justification for their stance, most referred to combating impunity, holding individuals accountable and putting an end to human suffering as a justification for how they voted. Other than the United States, who justified the referral as a means of deterrence for the Libyan Government to stop persecuting citizens, there was no evidence of member states being politically motivated in their decision to vote for Resolution 1970. Fisher (2013) argues that it was in the best interest of the United States to end the rule of Gadaffi, in order to enable a regime change. This is also evident in the US statements in the Council that they wished to intervene in Libya. However, China did present low accountability as the short justification provided was limited to referring to Libya as “a special situation”, without explaining why this was the case (UNSC 6491, 2011).

Lastly, in terms of the securitization, there was evidence of the framing of human rights violations in Libya as a security threat, in the statements provided by France and Russia. Richard Kilroy (2018) defines securitization as the process by which states determine threats based on a subjective analysis of national interests. Accordingly, France referred to the assurance of political transition and democracy for Libya which could be interpreted from the perspective of the democratic peace theory as the desire for democracies to safeguard peace and prevent the escalation of conflict in the region (Mullerson, 2012). This would be in the national interest of France and other democratic states. Similarly, the Russian Federation stated their concern for Russian nationals in Libya and the need for developing peace in order to safeguard them and their assets, which was reiterated by other member states. Non-permanent members, India and Germany, demonstrated the securitization of the case referral of Libya. For example, India stated that, “The proliferation of weapons has emerged as a major problem, posing a threat to the stability of Libya as well as to that of the larger region”, hence justifying their decision as a means to control the proliferation of weapons which could be seen as directly unrelated to the human rights violations in Libya (UNSC 6528, 2011).

3.2 Resolution 1970

The assessment of Resolution 1970 (2011) which unanimously passed in the Council to refer the case of Libya to the ICC, provided an insight into the outcomes that were agreed upon. For instance, Article 2 (b) recalls the statement provided by Russia, calling for the safe return and protection of their citizens (S/RES/1970, 2011). The Resolution also takes measures such as the freezing of assets, an arms embargo and a travel ban in order to get the Libyan government to cooperate with the criminal proceedings (S/RES/1970, 2011). Articles 4 to 8, cover the case referral to the ICC, where it can be seen that the clauses are not specific in terms of legal methods or procedures. Given that the case was referred within 12 days of the outbreak of the protests, critics of the UNSC argue that a thorough conflict analysis or the seriousness of the crimes were clearly not the basis of the referral. The question then becomes, why for example the case of Darfur was referred to the ICC, two years after the conflict arised?

In a statement submitted by the ICC, it was concluded that the case of Darfur was referred in March 2005 after the UNSC made note of a report submitted by the International

Commission of Inquiry on the human rights violations in Darfur (International Criminal Court, 2005). Two points were highlighted by the Commission, the 1.65 million internally displaced people and 200,000 refugees in Chad and the destruction of three villages in Darfur (International Criminal Court, 2005). This was mainly considered as the motivation behind the case referral of Darfur, however it also reflects the discrepancy in the evaluation of the case of Libya which was referred to the ICC, prior to a complete investigation of the human rights violations. Furthermore, in relation to Libya why was the case of Syria not referred to the ICC, given the gross violations of human rights? Table 2, consisting of data on the Council meetings on Syria are examined and discussed below, in relation to the findings on Libya in order to determine further discrepancies and hence, the politicisation of the case referral of Libya to the ICC.

3.3 Politicisation of Case Referral Decision on Syria by the Permanent Members

In comparison to the data obtained on Syria (Table 2), the draft resolution referring Syria to the ICC did not pass in the Council, with 13 members for and 2 members against (UNSC 6647, 2014). Two of which were permanent members, Russia and China. The findings revealed that in terms of conflict and human rights assessment, the US, France and the UK outlined the gravity of the situation and highlighted the seriousness of the crimes, in their statements to the Council. While both China and Russia expressed their concern for Syrians, they did not discuss or debate the violations taking place. This is indicative of their unwillingness to hold the Syrian government or groups accountable, due to their own involvement in Syria.

Secondly, both the US and the UK notioned to being obligated to the international community and stated the support of over 100 NGOs for the draft resolution (UNSC 7180, 2014). This can be interpreted as a reflection of the concern and anger of transnational actors, activists and the public towards the UNSC for not taking action in Syria.

Thirdly, the GGI revealed the lack of procedural fairness and consistency in statements provided by China. While China voted in favour of Resolution 1970 on Libya, they expressed their reservations for the ICC as a reason for voting against the draft resolution on Syria. Their justification for Libya was on the basis of continuous "killing of civilians and intolerable abuses of human rights" (UNSC 7180, 2014). However, Syria too experienced the consistent violations of human rights, which China chose not to assess in

their statement. This demonstrates discrepancy in the manner in which the human rights violations in Libya were assessed as compared to Syria.

Followingly, the P5 demonstrated accountability and transparency in their justification for voting in favour or against the resolution, however, the reasoning of Russia was related to their stance on Western countries, “pursuing regime change” which they believed would undermine the Geneva negotiations (UNSC 7180, 2014). Hence, their justification for voting against the case referral of Syria was transparent but clearly politically motivated. China on the other hand justified their position due to the fact that their recommendations on the Syrian crisis were not given consideration, which demonstrates the lack of procedural fairness but high accountability (UNSC 7180, 2014).

Finally, in terms of securitization, an exchange of statements between France and Russia revealed a mutual distrust and conflict of interest. Personal attacks were made, wherein Russia questioned the political motive of France and their “political passions” (UNSC 7180, 2014). Furthermore, the questions of military intervention, weapons and regime change were brought up, turning the debate into a political and security issue.

Comparing the cases of Libya and Syria reveals patterns of politicisation in the justifications provided by the P5. Evidently, when there are no conflict of interests concerning the region in question, there is unity within the P5 to take the appropriate measures towards the maintenance of peace and justice. For instance, there was more attention given to a human rights assessment when a P5 country was in favour of the resolution. However, when they were against the resolution, the permanent members chose to refrain from examining matters of justice and human rights and instead resorted to unrelated issues such as the lack of trust in the motivations of another P5 member. The exchange of words between Russia and France exemplified this.

3.4 Reaction of the ICC to case referral of Libya

In order to gauge the extent of politicisation, the reaction of the ICC to the Libyan situation and the reaction of the ICC to the case referral, could provide an insight into how controversial this decision was. The official statements published on 23 February 2011, before the adoption of Resolution 1970, and 28 February, after the adoption, demonstrate that the ICC did not expect the case referral of Libya since they did not release a report on the situation themselves. In a press release on 23 February, ICC prosecutor Louis

Moreno-Ocampo stated that the ICC would only act if the case was either referred to it by the UNSC or by the Libyan government (International Criminal Court, 2011b). At this point, a Council meeting had already taken place regarding Libya which brought it into the agenda of the ICC. This illustrates the dependency of the ICC on the interests of the P5 in the UNSC, and its lack of authority on international criminal jurisdiction. In a following press release published on 28 February, the Office of the Prosecutor stated it has “to now decide whether an investigation into alleged crimes against humanity committed in Libya since 15 February 2011 should be opened” (International Criminal Court, 2011a). This demonstrates the lack of human rights assessment and reportage of the Libyan case before it was referred to the ICC (Fisher, 2013). It can be inferred that the discrepancy in how cases are referred or deferred, demonstrates selective justice and politicisation.

4. Discussion

Since the Rome Statute came into force, the relationship between the UNSC and the ICC have been consistently scrutinised for credibility and legitimacy problems. A majority of literature criticises the Security Council for its double standards and structurally politicised decisions (Fisher, 2013). The double nature is evident in the exercise of case referrals to the ICC by states that are not party to the Rome Statute, as seen in the case of India, USA, Russia and China. These member states voted for Resolution 1970, however, expressed their uneasy and critical position regarding the ICC itself. Mistry (2012) argued that the ICC is simply a policy tool for the Security Council. More importantly, he questions the lack of a criteria against which case referrals can be assessed. This enables the intrusion of national security, military and policy interests in international criminal justice, thereby compromising the authority of the ICC.

In the case of Libya, it should be noted that the case was referred within a short time-frame. A meeting was held on 22 February 2011 to discuss the draft resolution and consider the recommendations of the Human Rights Council. On 26 February, the resolution was adopted. This demonstrated that the Security Council did not wait for the exhaustion of all the measures and procedures before taking decisive action, unlike for example the case referral of Darfur. Hence, the lack of instruction on the procedure of case referrals is a significant factor enabling politicisation and hindering consistency in the maintenance of international peace and justice. Secondly, it was evident from the analysis of the data that the ICC is being used as a “policy advancement tool” as the justifications provided by member states such as the US and China demonstrated the perception of the ICC as a measure of last resort and not as an institution to prevent impunity for serious crimes against humanity (Mistry, 2012, p. 3).

In reference to the hypothesis of this thesis, it can be discerned from the findings that it was in the interest of the P5 to pursue regime change in Libya through the ICC. Furthermore, the fact that the case of Syria was not referred to the ICC reveals that human rights violations in Libya was not the singular reason for referring the case to the ICC. Evidently, supporting the Gadaffi regime was not in any country’s national interest which is why there was unity in the P5. To date, all cases that are brought to the ICC can be regarded as international societies ‘outsiders’ (Fisher, 2013). The ICC’s involvement in Libya and lack of involvement in Syria.

This thesis attempted to examine to what extent the UNSC used Libya as a political tool by referring the case to the ICC in 2011. It can be concluded that the Libyan case was politicised in terms of the lack of procedural fairness, human rights assessment and the securitization of the human rights violations in Libya. While the degree of accountability was high in the sense that the permanent members were transparent with their positions and provided clear justifications, they did not extensively analyse the human rights violations and conflict in Libya.

Secondly, Russia, France and the UK referred to enabling political transition in Libya, expressing the need for the protection of their own citizens and for post-conflict reconstruction. Hence, framing the human rights violation in Libya as a security threat and the possibility of military intervention to establish peace and order. This illustrates the UNSC using Libya as a political tool to enable regime change, since supporting the ruling government was not in any member states' interest. In comparison to the data obtained on the non-referral of Syria to the ICC, the discrepancy in how the cases were judged and evaluated further demonstrated the politicisation of the case referral of Libya. This was evident in the fact that the lack of conflicting political interests in the meetings concerning Libya, led to its referral to the ICC. While the clash of national interests of the P5 regarding Syria, did not lead to its referral to the ICC, even though there was profound evidence of human rights violations in Syria.

5. Conclusion

Given that states are the main international actors who are driven by self-interest, rationality and who engage in cooperation with other states only if it produces relative and absolute gains, the findings of this thesis are unsurprising. Any cooperation that may result in the damage of their own interests is unlikely to take place, regardless of the mandate of the UNSC which primarily is to maintain peace and justice.

The existence of politicisation poses several challenges and consequences to international criminal justice. The lack of unity within the P5 as a direct result of conflicting national interests, hurts the legitimacy and credibility of the ICC and the UNSC itself. Secondly, it weakens the existence of an anti-impunity norm when it is only applied selectively. The Libyan situation emphasised the problems in the mission of international criminal justice which aims to prosecute individuals but is dependent on states as principal actors (Fisher, 2013). The ICC's involvement in Libya and lack of involvement in Syria resulted in criticism towards the ICC's legitimacy, authority and the legal and moral basis of its existence (Fisher, 2013).

This research was successful in expanding on literature about the existence and consequences of politicisation, by analysing the extent to which issues of peace and justice are politicised by the UNSC

However, this study included certain weaknesses such as the limited access to data on Council meetings concerning Libya, specifically the closed meeting which took place before the passing of Resolution 1970. Secondly, in order to identify a pattern of politicisation, it would have been beneficial to use a wider case analysis and compare cases that were deferred or not considered by the UNSC such as Burundi, Myanmar and Kashmir. Lastly, since, an exploratory qualitative analysis was conducted, there is the possibility of bias in the interpretation of the data.

In order for the international community to combat impunity, it is imperative that the legitimacy and credibility of the ICC is sustained. However, politicisation weakens the anti-impunity norm to a great extent by serving selective justice. Future research is required to determine the direct influence of politicisation on the legitimacy of the ICC and whether states are increasingly apprehensive to cooperate with the ICC due to this. Additionally, an examination of politicisation within the ICC will further reveal and strengthen allegations of selective justice.

The UNSC's case referral of Libya and negligence toward Syria did not go unnoticed, as civil, political and transnational actors raised several questions on the self-interested policies of the UNSC. The UNSC is under constant scrutiny and pressure to reform the structure of the institution, specifically demanding the removal of veto powers provided to the P5. Evidently, as long as global powers such as the US, China and Russia are reluctant to compromise on their judicial sovereignty, the enterprise of international criminal justice will continue to be threatened.

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Appendix

Table 1 - Politicisation of Case Referral Decision on Libya by the Permanent Members

Indicators	<i>6491th Security Council Meeting</i>	<i>6647th Security Council Meeting</i>	<i>6528th Security Council Meeting</i>
Is there evidence of conflict and analysis and human rights assessment?	<p>“Today’s resolution demands an immediate end to violence and repression, full respect for human rights and international law” (UK)</p> <p>“It is about human rights and fundamental freedoms. The Security Council has acted today to support the Libyan people’s universal rights.” (USA)</p> <p>“ it is of the greatest urgency to secure the immediate cessation of violence, avoid further bloodshed and civilian casualties” (China)</p> <p>“The killing of civilians and intolerable abuses of human rights must cease forthwith” (China)</p>	<p>“The warrants detail the systematic attacks against civilians, the methods employed to crush any form of opposition — forced disappearance, arbitrary detention, torture” (France)</p>	<p>–“Despite repeated promises of a ceasefire from the regime, we continue to see appalling attacks and excessive use of force” (UK)</p> <p>“Attacks by security forces against peaceful demonstrators were, as of 17 February, systematic and widespread. Civilians suspected of being associated with demonstrations were arbitrarily detained, abducted and tortured”(France)</p>

<p>Is there evidence of contestation or pressure from external actors?</p>	<p>“The adoption of resolution 1970 (2011) by all 15 members of the Council is a powerful signal of the determination of the international community to stand with the people of Libya” (UK)</p>	<p>“When faced with the commission of atrocities, the international community and the Security Council can turn to an impartial and independent judicial institution that can begin to work immediately to identify those primarily responsible for committing crimes.” (France)</p>	
<p><u>Global Governance Index</u></p> <p>> Procedural Fairness (is there reference to the application of the appropriate procedures and methods? Is there evidence of consistency in positions taken?)</p>		<p>“As the violence in Syria and Yemen continues, the Council must reiterate its message as to the primacy of law and the need to combat impunity in all cases, just as it did following the crisis in Côte d’Ivoire.” (France)</p> <p>“China’s position on issues concerning the International Criminal Court remains unchanged” (China)</p>	<p>“All United Nations Member States, whether parties to the Rome Statute or not, should do the same” (UK)</p> <p>“The deteriorating situation in Syria is of increasing concern in that regard. The violent repression there must stop immediately” (UK)</p> <p>“The Chinese position on the International Criminal Court remains unchanged” (China)</p>
<p>>Accountability (do they explicitly justify and explain their positions? Are they transparent</p>	<p>“my Government has expressed its profound condemnation of them”(UK)</p>	<p>“We recall that, pursuant to resolution 1970 (2011), the Council transferred the entire</p>	<p>“We also believe that the success of the ICC in those efforts will act as a deterrent in the future and</p>

<p>with their decisions?)</p>	<p>“accountability for those responsible for the violence” (UK)</p> <p>“clear warning to the Libyan Government that it must stop the killing. Those who slaughter civilians will be held personally accountable” (USA)</p> <p>“Today, faced with the atrocities we have seen, impunity is no longer an option. The International Criminal Court in this matter once again finds justification for its existence” (France)</p>	<p>Libyan situation to the Court — not just the situation pertaining to the actions of the Al-Qadhafi regime” (Russia)</p> <p>“The United Kingdom is a strong supporter of the Court. It played a leading role in securing the unanimous adoption of resolution 1970 (2011)”. (UK)</p> <p>“Impunity must not be allowed to taint the transition. In that vein, reports of the arbitrary detention, torture and execution of Qadhafi loyalists must be investigated”</p> <p>“The significance of the message goes far beyond the context of Libya. It should be heard in other places where gross violations of human rights occur”.</p> <p>“Impunity is no longer tolerable. In that context, the Government of Syria ought to be aware that the eyes of the world are upon it”. (UK)</p>	<p>serve as a tool to end the era of impunity in Libya” (USA)</p> <p>“By referring the situation in Libya to the International Criminal Court, we took an important decision and we took it unanimously. It was an informed decision aimed at ensuring that those mainly responsible for these crimes were prosecuted, judged and imprisoned” (France)</p>
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<p>Securitization (is there evidence of issues being framed as a security threat?)</p>	<p>“This is necessary in order to prevent a full-scale civil war and to preserve Libya as a united, sovereign State with territorial integrity.” (Russia)</p> <p>“Reliable security must be ensured for those foreigners who remain in Libya, including Russian citizens, and conditions for their safe return home must be established” (Russia)</p>	<p>“If we are not careful not to act too late, the Security Council will have the distinction of having ensured that in Libya law prevails over force, democracy over dictatorship and freedom over oppression” (FR)</p> <p>“We must now move together to support the creation of an inclusive and democratic State in which Libyans of all backgrounds have a future and an opportunity to participate in the rebuilding of their country”.(USA)</p> <p>“The international community should continue its joint effort in support of political transition and post-conflict reconstruction in Libya” (China)</p>	
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Table 2 - Politicisation of the Syrian Case in the Security Council by the Permanent Members

Indicators	(6)7180th Security Council Meeting (May 22, 2014)	(6a)Meeting Coverage of 7180th Meeting (UN.org)
<p>Is there evidence of conflict analysis and human rights assessment?</p>	<p>“He recalls that he had done nothing, yet the expression of the 13 years old’s face was the most terrifying thing...”(USA)</p>	<p>“The representative of the United States said the draft resolution was about accountability for crimes so extensive and deadly that</p>

	<p>“the indiscriminate bombardment of civilian inhabited areas; horrendous violations, including systematic murder and torture in regime detention centres; the arbitrary denial of humanitarian access to those in need; and the use of siege and starvation as a weapon of war.” (UK)</p> <p>“The Government bombs civilian neighbourhoods with explosive barrel bombs, missiles and chemical weapons. Terrorist groups carry out indiscriminate attacks. Tens of thousands of people have been disappeared. Torture and starvation are carried out on a large scale” (France)</p>	<p>they had few equals in modern history” (US)</p> <p>“Thousands of photos, independently authenticated, showed bodies dead by starvation and other brutal methods. Those were not the dire consequences of a civil war, but a deliberate policy to punish” (US)</p>
<p>Is there evidence of pressure or interest for the case, from external actors?</p>	<p>“Why should the ICC pursue accountability for the atrocities in Africa but not Syria? For those who have asked the SC that very reasonable question, today they have their answer --..”(USA)</p> <p>“The draft resolution had the support of 13 members of the Security Council, 65 sponsors, more than 100 non-governmental organizations from all around the world, and the Syrian National Coalition. That shows the strength of international feeling on this issue” (UK)</p>	
<p><u>Global Governance Index</u></p>		

<p>>Accountability (do they explicitly justify and explain their positions? Are they transparent about their justification?)</p>	<p>“It deserves to be examined by an independent court and if crimes are proven, those responsible deserve to be held accountable”(USA)</p> <p>“Holding perpetrators to account for their actions is a vital element of a sustainable peace. No settlement in Syria can be real or lasting without justice” (UK)</p> <p>“It should be pointed out that this damage to P5 unity is being inflicted at a critical point in the efforts to find a political solution to the Syrian crisis” (Russia)</p> <p>“Pursuing regime change by force in Syria at all costs will prolong the crisis and undermine the Geneva negotiations” (Russia)</p> <p>“Regrettably, China’s approach has not been taken on board; China therefore voted against the draft resolution” (China)</p> <p>“China has continued to uphold an objective and impartial position on the question of Syria. China pursues no self interest on the issue, much less shield any party, faction or persons in Syria” (China)</p>	<p>“it was difficult to understand France’s motivation since that delegation had been fully aware of what the end result of tabling the text would be” (Russia)</p> <p>“While respecting the divisions within the Council, he continued, the draft resolution assigning the matter to the International Criminal Court did not threaten the prospect of negotiations because there was no peace process to threaten”. (France)</p>
<p>Procedural Fairness (Is there evidence of reference to alternate legal measures and procedures? Are the</p>	<p>“The draft resolution would have given the Prosecutor of the International Criminal Court a mandate to</p>	<p>“The Syrian people had a fundamental right to justice, and the United Nations had a duty to defend it, he</p>

positions consistent?)

investigate all war crimes and crimes against humanity perpetrated during the conflict, regardless of the identity or affiliation of the perpetrator” (UK)

“it did not help resolve the crisis (Libyan crisis, 2011) , but instead added fuel to the flames of conflict. After the cessation of hostilities, the ICC did not exactly rise to the occasion, to put it mildly. It did not contribute to a return of normalcy or justice in Libya, and instead evaded the most pressing issue” (Russia)

“What is most urgently needed now is to urge the Government of Syria and the opposition to immediately implement a ceasefire and put an end to the violence in order to start a third round of negotiations in Geneva so as to advance the political process and embark on a political transition” (China)

“in reality it is the regime that is refusing his proposed twopronged approach, namely, parallel negotiations on the subject of terrorism and the matter of the transitional Government”. (France)

“ China always has reservations concerning the referral by the Security Council of particular country situations to the ICC. This is our principled

emphasized, warning that if the Council could not agree, the credibility of the entire Organization would continue to suffer” (Deputy Secretary General)

	position”. (China)	
Securitization (is there evidence of issues being framed as a security threat?)	<p>“It is more difficult to discern the motives that led France to initiate the draft and put it to a vote, fully aware in advance of the fate it would meet” (Russia)</p> <p>“Why deal such a blow to P5 unity at this stage? Is it just to try once again to create a pretext for armed intervention in the Syrian conflict?” (Russia)</p> <p>“ It is telling that Ahmad Jarba, the leader of the National Coalition, made no effort to show up to the Geneva negotiations, and is instead travelling the world in search of weapons” (Russia)</p> <p>“The draft resolution rejected today reveals an attempt to use the ICC to further inflame political passions and lay the ultimate groundwork for eventual outside military intervention” (Russia)</p> <p>“I am absolutely speechless at the fact that the Russian Federation dares to raise the issue of weapons. But if the Ambassador of the Russian Federation wants, we can impose an arms embargo on Syria” (France)</p> <p>“Unlike what our Syrian colleague has just said, the draft resolution does not exempt foreign mercenary</p>	<p>“The crisis had unveiled the level of double standards within United Nations mechanisms and their use to target certain Member States in the name of law and justice”</p> <p>“The draft resolution was political, discriminatory, interventionist and aimed at disrupting Syria’s presidential elections, he said”</p> <p>“Their vetoes had done more than prevent the Syrian regime from being held accountable. They also protected monstrous terrorist organizations operating in Syria from being held accountable, as well as radical fundamentalists whose attacks demonstrated a lack of decency and humanity”.</p> <p>“Bad peace is better than a good quarrel,” he said, citing a Russian saying in pointing out that the draft resolution proposed by “Western colleagues” did not include a list of terrorist organizations, such as the Islamic Front, which led one to wonder whether there was an attempt to change the regime by force.”</p>

	terrorists from other countries from the jurisdiction of the International Criminal Court” (France)	
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