UNIVERSITY OF ZIMBABWE

FACULTY OF LAW

ANALYSIS OF THE ROLE PLAYED BY THE UN SECURITY COUNCIL TO THE INVESTIGATION, PROSECUTION AND ENFORCEMENT OF THE ROME STATUTE

by

TINASHE CHIKWATI

STUDENT NUMBER: R211173U

A dissertation submitted in partial fulfilment of the requirements for the degree of the Masters of laws Honours Degree (LMIL)

SUPERVISOR: DR G MUPANGA

- 2022 -

DEDICATION

I dedicate my dissertation to Mansel Emmanuel Machaya for your unwavering support throughout the writing of my dissertation. You have been my inspiration and have provided me with a conducive working space. You have supported me physically, emotionally and psychologically throughout this journey. I also dedicate this dissertation to my many friends and family, Lizzy Chimwaza and Takunda Chikwati who supported me throughout the process. I will always appreciate all they have done.

ACKNOWLEDGMENTS

Firstly, I would like to thank God who has taken me this far. I also wish to thank my lecturers for guiding me through my degree programme up to this stage. A special thanks goes to Dr Godfrey Mupanga, my supervisor, for his countless hours of reflecting, reading, encouraging and most of all patience throughout the entire process. Above all, I thank myself for not giving up and for all the hard work.

ABBREVIATIONS

ICC	International Criminal Court
NATO	North Atlantic Treaty Organization
UN	United Nations
UNSC	United Nations Security Council
UNC	United Nations Charter
US	United States
UK	United Kingdom

TREATIES

Rome Statute
Vienna Convention on the law of Treaties
United Nations Charter
Relationship Agreement

CASES

The Prosecutor vs Thomas Lubanga Dyilo, ICC, 01-017/21

Prosecutor v The Prosecutor v Omar Al Bashir, ICC-02/05-01/09

The Prosecutor v Ahmad Muhammad Harun ICC-02/05-01/07

The Prosecutor v. Saif Al-Islam Gaddafi ICC-01/11-01/11

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CHAPTER 1 - INTRODUCTION

1.1 INTRODUCTION

There already exists prevalent belief that there is selective prosecution within the International Criminal Court. The contribution or involvement of the UN Security Council does not make it any better. The UN Security Council has referral powers under Article 13(b) of the Rome Statute, deferral Powers under Article 16 of the Rome Statute and powers under Chapter VI of the UN Charter. Suffice to note that three of the five permanent members of the UN Security Council are not parties to the Rome Statute themselves yet they can still refer situations involving states that are not parties to the same Rome Statute.[1] It would not be farfetched to conclude that decisions to refer a situation to the ICC are susceptible to political abuse and this brings into play the political nature of the criminal justice system, the economics, the diplomacy and the dynamics thereof. The question that therefore begs an answer is whether the powers afforded to the UN Security Council in the investigation, prosecution and enforcement of the Rome Statute are justified. Is there a need for the restructuring of these provisions affording powers to the UN Security Council, and if so, how should they be restructured? Should criteria be developed to determine the referral process? If this is done, it would create consistency for future referrals. (This is in light of the fact that the UN Security Council were keen to refer Sudan and Libya but not the Burma).[2]

In so far as enforcement is concerned, the ICC relies on the UN Security Council for enforcement. The ICC has however raised awareness of the UN Security Council's lack of efforts by not providing necessary technical, political, peacekeeping and other appropriate resources to assist in investigations, arrests and other elements of cooperation.[3] The question that however ensues is whether clipping the UN Security Council's powers would not affect the enforcement of the Rome Statute.

1.2 BACKGROUND OF THE STUDY

1.2.1. CREATION OF THE SECURITY COUNCIL

The United Nations has six principal organs including the United Nations Security Council. Its primary responsibility is the maintenance of international peace and security. Of the six principal organs of the UN, the United Nations Security Council is the only organ that bears the authority

[1] M. Kaldo, A Decade of Humanitarian Intervention: The Role of Global Civil Society, Oxford University Press. 2001. 137

[2] n1 above, 139

[3] S. Tabak, War Crimes and the Development of the Rome Statute, Oxford University Press, Vol 40, 2006. 170

to issue binding resolutions on member states.[4] The creation of the Security Council dates as far back as the Post World War II era. It was created pursuant to the shortcomings of the League of Nations in maintaining international peace.[5] The Security Council's ever first session was held in January 1946. However, its operations were massively crippled in the succeeding years by the tension between the Soviet Union and the United States.[6]

There are fifteen member states which comprise the Security Council and of these fifteen members, five are permanent members. These are Russia, United Kingdom, the United States, France and China. Victors' justice appears to be at play here since these permanent members were the powerful states that were victorious in the 2nd World War.[7] Permanent members have the veto power that is to say they can block any substantive resolution passed.[8]

At the formation of the United Nations, the term "Four Powers" was created to refer to the four most powerful countries being USA, the Soviet Union, the Republic of China and the UK. These became the foundational executive organ of the United Nations namely, the Security Council.[9] France was later added at the Dumbarton Oaks Conference. At this conference, the issue of the veto rights of the permanent members was brought to the table and this was one of the most contentious issues discussed.[10] It was initially suggested that a state should not be allowed to veto a resolution on matters to which it was a party but this did not find favor with the majority.[11] At the Yalta Conference, it was agreed by the US, UK and Russia that the permanent members could not prevent debate on a resolution through their exercise of the veto right but each of the 'Big Five" had veto power in respect of actions by the Council.[12] That is the position to date.

1.2.2 POST COLD WAR ERA

The period following the Cold War saw a massive increase in the active participation of the United Nations Security Council in upholding its mandate of maintaining international peace and security. The resolutions adopted by the UN Security Council doubled between 1988 and 2000. For example, it did not condone the invasion of Kuwait by Iraq in 1991 and largely criticized the said invasion.[13]

However, this period also exposed the ineffectiveness of the UN Security Council. In the early 90s, there was a series of hostilities that took place almost concurrently and this put pressure on

[4] M. Hilaire, United Nations Law and the Security Council, Cambridge University Press, VOL 17, 2006. 104
[5] *n4 above,*
[6] B. O'Hara Foster, Justice goes Global, European Journal of Int. Law, 1998. 29
[7] M. Lippmann, The Pursuit of Nazi War Criminals in the United States and Other Anglo-American Systems, Washington International Law Journal, 1998. 208
[8] *N7 above, 210*
[9] *N4, above, p99*
[10] B. Aregawi, The Politicization of the International Criminal Court by the United Nations Security Council Referrals, Duke University Press, 2017. 304
[11] *N10 above, 305*
[12] *N10 above, 305*
[13] R. Dicker, Fight to the Finish, American Journal of International Law, 2003. 45

the UN Security Council (Haiti, Mozambique, Yugoslavia).[14] The UN Security Council's intervention in Bosnia where ethnic cleansing took place faced worldwide ridicule and the mission was described as an 'indecisive and confused mission in the face of ethnic cleansing."[15] In 1994, the UN Security Council failed to take any action in the heat of the Rwandan genocide and this was attributed to the Security Council's indecision.[16] The period that followed was worse. It saw peacekeeping missions being deferred to other states and/or organizations by the Security Council. The intervention in the Sierra Leone civil war was spearheaded by the British navy while the invasion of Afghanistan was led by the NATO.[17] All the Security Council did was to authorize the said interventions; yet enforcement must be executed by the UN peacekeeping mission which comprises military forces supplied by member states on a voluntary basis and whose funding does not derive from the main UN budget.[18] The invasion of the Iraq by the US in 2003 was done in utter neglect of seeking Security Council authority and this further exacerbated the already existing doubts concerning the effectiveness of the UN Security Council.

1.2.3. POWERS UNDER THE UN CHARTER

The Security Council has vast and unlimited powers under the UN Charter. Whenever a threat to international peace and security arises or at the very least threatens to arise, the Security Council is authorized under the UN Charter to investigate the said situation.[19] The Security Council has the power to make investigations in respect of any situation that may cause disturbance to international peace in terms of Chapter VI of the UN Charter.[20] It may then make recommendations which recommendations however lack a binding effect. This power is conferred upon the Security Council under Chapters VI and VII of the UN Charter.

Under Chapter VII of the UN Charter[21], the Security Council has much broader powers which are not only confined to investigations but to taking appropriate action to remedy the purported threat to peace and these remedies may also include the use of force and imposition of economic sanctions.[22] These Chapter VII powers are what the Security Council relied on when they intervened in Iraqi – Kuwait crisis in 1991 and in Libya in 2011.[23] Any resolution adopted in the

[14] R. S. Lee. The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results. American Journal of International Law. 2000. 92

[15] Benjamin Duer, The International Criminal Court and the Politicization of its Mechanisms, Harvard Int. L.J. 1998. 15

[16] *N15 above, para 2*

[17] N15 above, 16

[18] Hilaire, (*n4 above)* 199

[19] Chapter VI of the United Nations Charter, 1945

[20] Chapter VI of the United Nations Charter, 1945

[21] Chapter VII of the United Nations Charter, 1945

[22] A. Bellamy, Libya and the Responsibility to Protect: The Exception and the Norm' Ethics & International Affairs, 2011, 263.

[23] C. Stahn and M. El Zeidy, The International Criminal Court and Complementarity: From Theory to Practice Cambridge University Press, 2011, 233

exercise of the Chapter VII powers binds all UN member states. Of all the six UN bodies, only the Security Council can make binding decisions.[24]

1.2.4 POWERS UNDER THE ROME STATUTE

The broad powers of the UN Security Council are also recognized under the Rome Statute.[25] The Rome statute is the legal instrument creating the International Criminal Court. Its origins date as far back as the 1st and 2nd World Wars. The mandate of the Court is to prosecute the perpetrators of the four core crimes namely genocide, war crimes, crimes against humanity and crimes of aggression.[26] It has jurisdiction over individuals and not states. The court can only exercise its jurisdiction if it is invoked by a state party or through a referral by the Security Council.[27] The Rome Statute confers upon the Security Council the authority to refer to the court matters in which the Court would not ordinarily have jurisdiction.[28] One such referral that was made in the exercise of the Security Council power under Article 13 of the Rome Stature is the referral of Sudan in 2002. Sudan was then and is still not a party to the Rome Statute hence the Court did not have jurisdictional powers over it. Be that as it may, the Security Council invoked its referral powers thereby conferring jurisdiction to the court over Sudanese nationals. This was the first referral in the history of the UN Security Council and of the ICC.[29] The second referral was in 2011 when again an African country, Libya, which was not and is not party to the Rome Statute was referred to the ICC for investigation and possible prosecution.[30]

1.3 STATEMENT OF THE PROBLEM

The ICC has since its inception been accused of selective prosecution and being biased towards certain states.[31] The involvement of the UN Security Council in the operations of the Court makes the situation worse as it exposes the political nature of the international criminal justice system as a whole. It further exposes the economics, the diplomacy and the dynamics that are at play within the international criminal justice system. The involvement of the UN Security Council leaves the ICC vulnerable to political abuse where it is used to as a tool to advance the political agendas of the powerful states.[32] It is therefore necessary to be able to analyses the scope of the powers afforded to the UN Security Council in so far as the investigation, prosecution and enforcement of the Rome Statute is concerned. It is also necessary to establish whether there should be checks and balances to the UN Security Council's broad powers in light

[24] Rome Statute of the International Criminal Court, 2002
[25] Rome Statute of the International Criminal Court, 2002
[26] Article 1 of the Rome Statute
[27] Part 2 of the Rome Statute of the International Criminal Court, 2002
[28] Article 13(b) of the Rome Statute of the International Criminal Court,
[29] Michael Ramsden, Strategic Litigation before the International Court of Justice: Evaluating Impact in the Campaign for Sudanese Rights *European Journal of International Law*, 2010
[30] G. Werle et al. Africa and the International Criminal Court, International Criminal Justice Series 1. 2014. 204
[31] N*1 above. P89*
[32] *N1*

of the fact that all the executive, legislative and judiciary powers under the UN Charter are vested in the UN Security Council.[33]

1.4 RESEARCH QUESTIONS

The research seeks to:

1. Analyze whether the contribution of the UN Security Council in the investigation, prosecution and enforcement of the Rome statute is necessary
2. Explore whether the powers afforded to the UN Security Council under the UN Charter and The Rome Statutes are justified
3. Assess if there is any need for the provisions affording powers of the UN Security Council to be restructured and if so, how they should be restructured
4. Determine whether criteria should be developed to guide the referral process by the UN Security Council to the ICC
5. Proffer recommendations on the way forward in light of the view that the ICC relies on the UN Security Council to intervene in cases of non-compliance by state parties

1.5 METHODOLOGY

This research is a literature review: primary and secondary sources of data including legislation, case law, statutes, published books, journal articles and online resources are considered. The purpose is to provide a systematic exposition of the political nature of the UN Security Council and the politics governing its relationship with the ICC. The research also adopts the descriptive method to assess the nature and relationship of the UN Security Council and the ICC. This method is preferred in order to accurately and systematically describe how the Security Council influences the functioning of the Court.

Furthermore, the doctrinal approach is also employed. This method is good because it allows researcher to identify specific legal rules, then discuss the legal meaning of the rule, its underlying principles, and decision-making under the rule (whether cases interpreting the rule fit together in a coherent system or not). The researcher is also afforded a chance to identify ambiguities and criticisms of the law, and offer solutions. Sources of data in doctrinal research include the rule itself, cases generated under the rule, legislative history where applicable, and commentaries and literature on the rule.[34] Most importantly, the doctrinal method is applied in the analysis of the Rome Statute criminal jurisdiction and relevant international criminal law jurisprudence against the backdrop of the UN Security Council powers under the Rome Statute.

[33] Langer M. The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes, American Journal of International Law, 2011. 47

[34] Mark van Hoecke, Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline, Oxford University Press, 2013. 92

The research also adopts the case study research method. The cases of Dafur, Libya, Syria etc. are explored in a collective manner. Generally, in the application of this method, a selection of more than one case is usually preferred in lieu of examining just a single particular case. The research methos is used to explain, describe or explore events or phenomena in the everyday contexts in which they occur.[35] The cases analyzed in this research therefore show the nature of the UN Security Council's interference in the day to day running of the Court.

1.6 CHAPTER SYNOPSIS

Chapter 1

This chapter will introduce the research, give a background to the study, and set out the research aims and objectives as well as the chapter synopsis.

Chapter 2

In this chapter the focus is on the relationship between the UN SECURITY COUNCIL and the ICC. The nature of this relationship is what determines whether the powers of the UN Security Council under Article 13 (b) and Article 16 of the Rome Statute are justified.

Chapter 3

The exercise of the referral and deferral powers by the UN Security Council in the investigation, prosecution and enforcement of the ICC is explored in chapter three. The qualifications for the exercise of these powers are outlined. How the powers have been exercised is scrutinized by considering cases in point. The effect of the exercise of these powers in practice is highlighted.

Chapter 4

This chapter assesses the "Africa Problem," in so far as whether the UN Security Council is biased towards Africa. This is in light of the fact that the only two referrals by the Security Council to the ICC involved African countries. The attitude of African countries towards the ICC is also explored in this chapter

Chapter 5

A summary of the findings is provided and proposals are put forward as to how consistency and predictability in future referrals and deferrals can be achieved.

[35] Lee Epstein and Andrew D. Martin, An Introduction to Empirical Legal Research, Oxford University Press, 2014. 35

CHAPTER 2 – THE RELATIONSHIP BETWEEN THE UN SECURITY COUNCIL AND THE ICC

2.1 INTRODUCTION

The International Criminal Court was borne out of a treaty that was negotiated within the confines and framework of the United Nations. The process involved considerations of questions of international criminal law within the United Nations. It was eventually agreed that a permanent court be established to adjudicate international crimes.[36] Although it can be argued to be a brainchild of the United Nations, the Court was established as an independent judicial organ whose operations are separate from those of the United Nations.

2.2 THE RELATIONSHIP BETWEEN THE UNITED NATIONS AND THE ICC

The idea of establishing a permanent international criminal court goes as far back as the period before the creation of the United Nations. There was no clear relationship between the United Nations and the foreseeable court; it only became a little clearer during the period of the drafting of the Rome Statute.[37] In view of the fact that the United Nations is largely viewed as a political organ, it was pertinent that the ICC from the time of its inception be as independent as possible from the operations of the United Nations. Further to that, as a judicial organ, the Court had to maintain the utmost judicial independence.[38] The Court thus came into existence with its operations utterly independent from the United Nations.

The question that however arises is whether the Court could achieve maximum independence without the interference of the United Nations. Article 2 of the Rome Statute[39] becomes pertinent here. In terms of Article 2, the Court was mandated to enter into a relationship with the United Nations through an agreement. The said relationship agreement was entered into and came into force in October of 2004.[40] It became clear henceforth that the Court needed the support of the United Nations in order for it to function properly.

The relationship agreement stressed the complementary nature of the relationship between the United Nations and the Court. The role of the United Nations is to complement the Court and not to interfere with the functioning of the Court. As such the Court, according to this agreement maintains its full judicial independence. The Agreement further placed an obligation upon the United Nations to give full support to the Court as well as cooperate fully with the Court.[41]

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[36] Louise Arbour, The Relationship Between the ICC and the UN Security Council, Global Governance, 2014, 197

[37] Danner A M, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War,* V and L Review, 2006, 56

[38] *N*1, *supra*

[39] Article 2 of the Rome Statute, 2002

[40] The Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, 2004

[41] Article 18 of the Negotiated Relationship Agreement, *ibid*

Under Article 18 of the said Agreement, the United Nations is under an obligation to cooperate with the Court's prosecutor in the investigation of the crimes which fall within the ambit of the Court's jurisdiction. Article 18 in part reads as follows;

> "The United Nations undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under article 54 of the Statute, his or her duties and powers with respect to investigation and seeks the cooperation of the United Nations in accordance with that article."[42]

The Prosecutor and the United Nations may enter into an agreement whereupon the United Nations undertakes to furnish the Prosecutor with documents which documents shall not be disclosed to any other parties. This agreement is entered into on the grounds of confidentiality and the documents should be relevant for purposes of generating new evidence.[43] The Prosecutor is empowered under Article 54 (3) (e) of the Rome Statute to enter into such confidentiality agreements and not to disclose any documents obtained under the said confidentiality agreement without the consent of the provider of the said documents or information.[44]

Notwithstanding the provisions under Article 54 (3) (e) of the Rome Statute and those of Article 18 of the Relationship Agreement, the Prosecutor is entitled to furnish and disclose to the defence that is in his possession as long as such is relevant to prove that the accused did not commit the offence or which may be adverse to the case of the prosecutor against the accused.[45] The Prosecutor is further obligated under Rule 77 of the Rules of Procedure and Evidence[46] to "permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are," *inter alia*, "material to the preparation of the defence." [47]

Therefore, a lot of controversy surrounds the statutory provisions which permit the Prosecutor to obtain documents and information on a confidential basis and not disclose to third parties while at the same time the same Prosecutor is mandated to disclose all material information to an accused person regardless of how it was obtained. This controversy became more apparent in the investigation of Thomas Lubanga Dyilo of the Democratic Republic of Congo.[48] The documents and information upon which the Prosecutor heavily relied on were obtained through entering into confidentiality agreement with the United Nations and other non- governmental organisations.

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[42] *ibid*

[43] Paul C. Szasz and Thordis Ingadottir, The UN and the ICC: The Immunity of the UN and Its Officials, Cambridge University Press: 2004, 1924

[44] Article 54 of the Rome Statute, ibid

[45] Article 67 of the Rome Statute, *ibid*

[46] International Criminal Court Rules and Procedure of Evidence

[47] ibid

[48] The Prosecutor vs Thomas Lubanga Dyilo, ICC, 01-017/21

As such, under Article 54 (3) (e) of the Rome Statute, the Prosecutor could not disclose this evidence to the accused.[49] However, Article 67[50] of the same Rome Statute demanded that the Prosecutor discloses all material evidence to the defence. The trial was delayed because the Prosecutor required consent for him to disclose the documents which consent, he failed to obtain in respect of the larger part of the evidence. Ultimately proceedings were stayed because a fair trial could not ensue without full disclosure of all material evidence to the accused.[51] Although proceedings were later re-instituted, there was a significant delay.

For purposes of ensuring a fair trial in the ICC, it is prudent that the Prosecutor makes available all the information he would have gathered during his investigations; whether such information is favorable or not to the accused person. In terms of Article 54 (1) of the Rome Statute, the Prosecutor has a duty to disclose even the exonerating information to the accused.[52]

While it is important that the United Nations protects its members by disclosing evidence to the Prosecutor on a confidentiality basis, such confidentiality should be balanced with the right of the accused to a fair trial and the duty of the Prosecutor to ensure a fair trial. In this case, the confidentiality agreement is far outweighed by the right to a fair trial. In all cases, a balance should always be struck. There are other measures that can be taken to ensure the protection of the United Nations staff such as those that are taken in the protection of witnesses.[53] Furthermore, the United Nations has a duty in terms of the Relationship Agreement, the Rome Statute and the United Nations Charter, to cooperate fully with the ICC and the disclosure of important evidence during the investigation of a matter by the Prosecutor constitutes such cooperation.[54] In the Thomas Lubanga case, the United Nations eventually conceded to the disclosure of the "confidential" documents and the trial was re- opened.[55] This shows that the delay in the investigation and prosecution of Lubanga was instigated by the United Nations. Its duty is to cooperate with the Prosecutor and to ensure that the Court functions properly but its involvement can be argued to be somewhat controversial.

The United Nations Charter bestows upon one of the principal organs of the United Nations, namely, the Security Council, vast powers in maintenance of international peace and security. Chapter VII of the United Nations Charter[56] empowers the Security Council to use force or take

[49] The Rome Statute, 2002
[50] The Rome Statute, ibid
[51] Thomas Lubanga Dyilo case, n8, supra
[52] N9, Supra
[53] Jennifer Trahan, The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices, Crim Law Forum, 2013, 417
[54] Ibid, 430
[55] Thomas Lubanga Dyilo case, ibid
[56] The United Nations Charter, 1945

necessary steps to ensure that international peace is observed. Although the ICC is not in itself an organ of the United Nations, it is important to note that the creation of the International Criminal Court was a step taken to further the maintenance of international peace and security. As such, the relationship between the Court and the United Nations is indispensable.[57] The court cannot operate in the absence of its close relationship with the Court, "both for administrative purposes, in order to enhance its universality, authority and permanence, and because in part the exercise of the court's jurisdiction could be consequential upon decision by the Security Council."[58] What then becomes a point for consideration is why the Court was created as an independent organ to begin with. There is too much involvement and influence of the United Nations in the operations of the Court. It would not be farfetched to conclude that the Court was created to further the political interests of the United Nations. The Relationship Agreement further strengthens the relationship between the United Nations and the Court and makes it difficult for the Court to operate as independently as it should.[59]

The United Nations and the Court enjoy quite a controversial relationship. The first aspect of the relationship between the UN and the ICC that has been the subject of recent debate relates specifically to the relationship between a particular organ of the UN, namely, the fifteen-member United Nations Security Council and the Court[60]. There are provisions in the Rome Statute which give effect to this relationship.[61] It is governed in part by Article 13 which gives the UN Security Council referral powers to refer matters to the court even when the court does not have jurisdiction over the said matter by virtue of the persons being nationals of a country which is not party to the Rome Statute.[62] It is further governed by Article 16 of the Rome Statute, which gives the UN Security Council deferral power to have a matter suspended for a period of twelve months in respect on any investigation or prosecution which has already commenced or is about to commence.[63] Moreover, the UN Security Council must be satisfied that the suspension of an investigation or prosecution of a matter will be pertinent for the restoration and maintenance of international peace.

2.3 ARTICLE 16 OF THE ROME STATUTE

[57] Gabriel M. Lentner, Th e Role of the UN Security Council vis-a-vis the International Criminal Court Resolution 1970 (2011) and its challenges to International Criminal Justice. *International and Comparative Law Review Vol* 14, 2014 pp9-17

[58] ibid

[59] The Relationship Agreement, *n*5, *supra*

[60] Global Policy Forum, The Relationship Between the ICC and the Security Council: Challenges and Opportunities, International Peace Institute, 2014. 16.

[61] Article 13 of the Rome Statute, ibid

[62] ibid

[63] Article 16 of the Rome Statute, ibid

Article 16 naturally confers a radical role to the UN Security Council which can block for one year and even indefinitely, year after year, any investigations or prosecutions undertaken by the ICC Prosecutor.[64] Article 16 confirms the relationship between the ICC and the UN as it gives reference to Chapter VII to the UN Charter. As already stated, Chapter VII of the UN Charter confers power on the Security Council to take measures to "maintain or restore international peace and security" if it has determined "the existence of any threat to the peace, breach of peace or act of aggression."[65] Article 16 reads as follows:

"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."[66]

From the reading of Article 16, it is clear that the UN Security Council has unfettered discretion to determine which specific matters qualify to be considered as threats to international peace and security. There are no criteria for determining which issues specifically are legible for deferral in the exercise of the UN Security Council's Article 16 powers and the Court does not go as far as assessing the legitimacy of a deferral.[67] The power thus ultimately lies with the UN Security Council and such a situation is problematic because it brings into play the politics within the international criminal justice system. To confer to one organ such vast powers in the investigation and prosecution of international criminals is a disaster. It is not farfetched that the political relations between the UN Security Council and the country of nationality from investigations or prosecution is ongoing affects whether the Security Council will exercise its deferral powers or not. If it benefits them politically, or economically that an investigation be discontinued, then they will exercise their powers as such. There are instances where it was prudent and in the interests of maintenance of international peace and security to defer investigations; yet the UN Security Council did not exercise this power. The case of al Bashir of Sudan is pertinent and will be discussed in Chapter 3 to follow.

From the face of it, Article 16 would appear to belong under Part 5 of the Rome Statute which deals with investigation and prosecution. Instead, it is located under Part 2 which deals with jurisdictional issues.[68] One would think that there is little or no relationship between the Article and the part it falls under. However, if we look at the preceding Articles, thus Articles 13 to 15, they deal with how the jurisdiction of the court may be invoked. Articles 15 and 16 then deal with situations where the powers of the prosecutor may be limited.[69] In the first instance,

[64] Article 16 of the Rome Statute, ibid
[65] Yassin M. Brunger, The ambiguities of Security Council Resolution 1422, European Journal of International Law, Vol 14, 2003 pp. 85-104
[66] Article 16 of the Rome Statute, ibid
[67]Sheraz Ibrahim. Critically evaluating the special international relationship between the UN Security Council and the International Criminal Court (ICC). QALAAI ZANIST JOURNAL, 2021 907.
[68] The Rome Statute, ibid
[69] Articles 13-15 of the Rome Statute, ibid

prosecutorial powers are limited where the Pre-Trial Chamber exercises judicial control in terms of Article 15. This entails that a Prosecutor requires the authority of the Pre-Trial Chamber before instituting an investigation. As such, the Prosecutor may not act proprio motu.[70] In the second instance, the Prosecutor's powers are limited by the UN Security Council in its exercise of its deferral powers under Article 16. This entails that even where investigations or prosecution has commenced, the UN Security Council has the power to stop the same for a renewable period of twelve months. Such suspension of investigations or prosecution may be suspended indefinitely by way of continual extension of the twelve-month period.[71]

2.3.1 ARTICLE 16 AND THE COURT'S JUDICIAL INDEPENDENCE

Judicial independence refers to the concept of separation of judicial powers from other branches of power. This means that in the exercise of their juridical functions, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests, in accordance with the principle of the separation of powers.[72]

As has already been stated earlier in this chapter, the UN Security Council enjoys absolute power to determine whether a situation falls within the ambit of section 39 of the United Nations Charter for purposes of deferral of the same situation under Article 16 of the Rome Statute.[73] It is unclear whether the Court has a separate duty to assess whether the deferral is justified or not. From practice, it appears that the Court is hesitant to treat with circumspection the decisions of the UN Security council.[74] This could be attributable to the fact that the UN Security Council, particularly the big powers, are the major funders of the Court and questioning their decisions could lead to withdrawal of funding. Apart from that, if the Court were to challenge the decisions of the UN Security Council with regards to Article 16, this would nullify the whole essence of the whole Article.[75] As such, the Court has not exercised its judicial review in so far as Article 16 of the Rome Statute is concerned.

Article 16 falls short of a scope for its application. It does not state at what stage exactly the UN Security Council may invoke it.[76] However, what is clear is that as long as an investigation or prosecution has commenced, the UN Security Council has exclusive powers to stop the same. The power of judicial interference here is astounding to say the least, that is to say, whether prosecution is already at an advance stage, the UN Security Council can interfere and stop the same at any stage. In some instances, however, the interference will be justified by the need to

[70] Article 15 of the Rome Statute, *ibid*
[71] Article 16 of the Rome Statute, *ibid*
[72] Victor O. Ayeni and Matthew A. Olong, Opportunities and Challenges to the UN Security Council Referral Under the Rome Statute of the International Criminal Court, African Journal of International and Comparative Law, Edinburgh University Press, 2017. 215-223
[73] N 32, *supra*
[74] Nigel White and Robert Cryer, The ICC and the Security Council: An Uncomfortable Relationship, International Humanitarian Law Series, Vol 19, 2009. 457
[75] J. Dugard, International Law: A South African Perspective JUTA, 2010. 207
[76] *ibid*

preserve international peace and security. This brings into play the debate of peace over justice and vice versa. As others say, indeed, sometimes necessity of peace could prevail on the quest of justice.[77]

Another controversy surrounding Article 16 is the issue of the period that a suspension may go for. The Article allows for a renewable period of twelve months. If the renewal is exercised every year, it then means that an investigation or prosecution will be suspended indefinitely.[78] What this does is to provide immunity for certain persons by this indefinite extension. Even where a prosecutor has commenced investigations proprio motu, the UN Security Council may still intervene and suspend the said investigations and or prosecution thereby helping the concerned person or category of persons an opportunity to evade justice.[79] This shows that the decisions of the UN Security Council under Article 16 are susceptible to political abuse and curtail the judicial independence of the court. However, there are instances where the extension of the suspension period is necessary for the preservation of international peace and security and the continuance of investigations of prosecution may jeopardise the UN Security Council in the exercise of their sole mandate of maintaining international peace and security.[80]

In the case of preservation of evidence and witnesses, deferring a matter in terms of Article 16 of the Rome Statute could sometimes destroy this initiative. For instance, in sexual matters, evidence should be collected within a reasonable period and same may be lost if the suspension runs for too long.[81] An accused person who gets released on the basis of a suspension may also have an opportunity to interfere with witnesses and destroy evidence and this defeats the objectives of the interests of justice. Even if the trial does eventually re-commence, the integrity of the proceedings would be compromised.[82] Therefore, the involvement of the UN Security Council in the investigation prosecution and enforcement of the UN Security Council takes away the judicial independence and autonomy of the ICC.

The voting criteria within the UN Security Council when considering a deferral is also disproportionate. In terms of Article 27 of the UN Charter[83], if the UN Security Council intends to adopt a resolution on Article 16 of the Rome Statute, a vote of the nine members in the affirmative out of the 15 members of the Security Council is required. It takes a single negative vote by a permanent member of the UN Security Council to prevent a resolution on a deferral to be adopted. Ordinarily, this exposes the infinite debate around the disproportionate powers held

[77] D. Tolbert and A. Solomon, United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies, Harvard Human Rights Journal. 2006 23–36

[78] P. Gargurilo, The Controversial Relationship Between the International Criminal Court and the Security Council, Cornell International Law Journal, 2000. 67

[79] Alexandre Skander Galand, UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits, European Research Council, 2007. 109

[80] *ibid*

[81] A. Uacka, Feature Lecture: Building the International Criminal Court, Global Business and Development Law Journal 2011, 201

[82] *ibid*

[83] The United Nations Charter, 1945

by the UN Security Council's permanent members in so far as their capacity to stop a deferral by a veto is concerned; Moreso because some of them are not even parties to the Rome Statute that establishes the ICC.[84]

It is not challenged that the UN Security Council is a political organ whose primary mandate is the maintenance and restoration of international peace and security. Therefore, the decisions that this organ adopts are influenced by political will.[85] The exercise of the UN Security Council deferral powers under Article 16 are intertwined with the goal of achieving international peace and security hence these deferrals are also political in nature.[86]

2.4 ARTICLE 13 (b) OF THE ROME STATUTE

The ICC has jurisdiction over four core crimes namely genocide, war crimes, crimes against humanity and crimes of aggression. The Court can only exercise its jurisdiction over these international crimes if they are deemed to have been committed on the territory of a State Party or by one of its nationals. However, there are instances where these conditions do not apply. Firstly, where the parties themselves consent to the jurisdiction of the court by way of a declaration and secondly where the United Nations Security Council refers a situation to the Prosecutor. This is notwithstanding that the parties so referred are nationals of a state that is not party to the Rome Statute.[87] This practice amounts to double standards especially considering that three out five permanent members of the UN Security Council are themselves not party to the Rome Statute yet they have vast powers that allow them to confer jurisdiction on the ICC over non state parties.[88] Such an arrangement exposes the political muscle that the UN Security Council exercises over other states in respect of the Rome Statute. The jurisdictional issues are encompassed in Article 13 of the Rome Statute which states 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:
(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by
a State Party in accordance with article 14;
(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; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15."[89]

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[84] Max du Plessis African guide to international criminal justice Institute for Security Studies, 2008, 37
[85] Trahan, J. The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices. *Criminal Law Forum*, 2013. 471–473.
[86] *ibid*
[87] N43, *supra* p 98-99
[88] *ibid*
[89] Article 13 of the Rome Statute, *ibid*

Article 13(b) empowers the UN Security Council acting under Chapter VII of the UN Charter to refer situations to the Prosecutor of the ICC. In this regard, Article 13(b) of the ICC Statute can best be described as a 'bridging mechanism', in the international legal order, between two separate and autonomous international organisations, namely the ICC and the Security Council, and their respective mandates.[90] When the security Council triggers the ICC's jurisdiction, it empowers the Prosecutor to initiate an investigation into the referred situation. This measure is time and cost effective due to the duration and resources required to set up an ad hoc tribunal. It also gives room for uniformity within the international criminal jurisprudence as all criminal matters will be dealt with by one court.[91] The Security Council referral imposes a binding command upon states irrespective of whether they are state parties to the Rome Statute or not. These referrals are not restricted to the geographical location neither through territoriality nor nationality.[92] Security Council referrals therefore confer universal jurisdiction on the ICC.

The role of the Security Council has become quite central in global affairs and this has been so even before the inception of the Rome Statute. In recent years this role has even evolved and in so far as the international criminal justice system is concerned, the Security Council now takes center stage.[93] Long before the Rome Statute was adopted, Koskenniemi had the following to say about the role of the Security Council:

> '… Given the Council's composition and working methods, its monopolization of UN resources and the public attention focused on the Council is problematic. The dominant role of the permanent five, the secrecy of the Council's procedures, the lack of a clearly defined competence and the absence of what might be called a legal culture within the Council hardly justify enthusiasm about its increased role in world affairs…'[94]

Referrals under Article 13(b) are based on a prior discovery of the existence of a threat to the international peace and security hence the reference to Chapter VII of the UN Charter. Suffice to note that while the Security Council enjoys considerable power to refer a situation to the ICC, it still retains its discretion to establish ad hoc international criminal tribunals still acting under its Chapter VII powers.[95] The setting up of criminal tribunals is one of the ways which the UN Security Council may utilize in order to facilitate its obligation to maintain international peace and security. There are no criteria for which situations specifically may be referred to the ICC

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[90] Gabriel M. Lentner, The Role of the UN Security Council vis-à-vis the International Criminal Court –Resolution 1970 and its challenges to International Criminal Justice International and Comparative Law Review, Vol 14, 2014, 1114

[91] *ibid*

[92] Jordan J. Paust, The Reach of ICC Jurisdiction over Non-Signatory Nationals, Vanderbilt Journal of Transnational Law, Vol 33, 200, 309

[93] D. N. N. Nsereko, Triggering the Jurisdiction of the International Criminal Court, African Human Rights Law Journal 2004, 206

[94] *ibid*

[95] Schabas W. A, An introduction to the International Criminal Court, 3rd Ed, Cambridge University press, 2004, 88

and do not qualify to be dealt with under ad hoc tribunals.[96] What this entails is that the decision ultimately lies with the UN Security Council and if it is in their political interests to refer a matter to the ICC and not set up an ad hoc tribunal for the adjudication of the matter, their political interests will be the decisive factor. A good illustration would be the trial of Iraq's Saddam Hussein.[97] A hybrid criminal court was set up when there was the option of referring the situation to the ICC. This was because some of the permanent members of the UN Security Council wanted Saddam Hussein hanged, and there is no such provision for the death sentence under the ICC, hence they resorted to establishing a hybrid court whose operations they could control.[98] If we view Article 13 (b) from this perspective, it becomes apparent that it is not warranted. The UN Security Council has the option of trying nationals of states nonparty to the Rome Statute by establishing ad hoc criminal courts. This would prevent imposing jurisdiction on non-state parties to the Rome statute and infringing on those states' sovereignty. Issues of enforcement would also not arise because non state parties are not bound by the decisions of the ICC and it is unlikely that they would cooperate with the Court where jurisdiction is imposed.[99]

The executive organ of the United Nations in which the primary role of maintaining international peace and security is vested is known as the Security Council. In the discharge of its primary responsibility of maintaining international peace and security, the Security Council is further empowered to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression and also to make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'[100] Where a threat to the peace is perceived to exist, any interested party may bring the situation to the attention of the Security Council. However, only the Security Council itself has the power to make the determination whether a threat to the peace or a breach of the peace exists.[101] Where such breach or threat has been considered to be apparent, the Security Council has the autonomy and discretion to invoke its Chapter VI and/or its Chapter VII powers under the UN Charter.[102] Under Chapter VI, the treat to peace need not be real but apparent and the decisions adopted by the Security Council thereunder are only recommendatory in nature. Under Chapter VII however, the threat must be actual and the resolutions adopted thereunder have a binding effect. The Security Council may thus take any reasonable measures necessary to preserve or maintain international peace and security. In the exercise of its Chapter VII powers, the Security Council may set up international criminal tribunals as it did with the International Criminal Tribunal for

[96] *ibid*
[97] Iraqi Special Tribunal, October 2005 – December 2006.
[98] *ibid*
[99] Cryer R, The ICC and its Relationship to Non-States Parties. in C Stein (ed.), The Law and Practice of the International Criminal Court. Oxford University Press, Oxford, 2015. 260-265
[100] N35, supra, pp 134 -139
[101] N32, *supra*
[102] The United Nations Charter, *ibid*

Rwanda and the International Criminal Tribunal for Yugoslavia respectively.[103] These were measures that were aimed at the restoration and maintenance of international peace and security. Even though these tribunals were established after the fact, they were necessary to hold accountable perpetrators of the most heinous of international crimes and adjudicate individual guilt.[104]

Still in the exercise of its Chapter VII powers, the Security Council may invoke Article 13 (b) of the Rome Statute and refer a situation which appears to pose a threat to international peace to the ICC for adjudication. This is regardless of whether the state so referred is party to the Rome Statute or not.[105]
In terms of international law, the principle of sovereignty demands that a state has the right to consent to the jurisdiction of an international court before it is exercised. This is done by way of a multilateral treaty, and in the case of international crimes, the Rome Statute is the multilateral treaty that a state has to sign in order to be bound by the International Criminal Court.[106]
However, under Article 13 (b) of the Rome Statute, the ICC finds basis for its jurisdiction in the UN Security Council referrals. In this case, the referred state would be bound to accept the jurisdiction of the Court through a resolution of the Security Council. This is true even for states that are not party to the Rome Statute.[107] What this entails for the Court is that the extent to which it may exercise its jurisdiction and the scope thereof are confined to the Security Council resolution adopted on the matter and may not be limited nor extended by the provisions of the Rome Statute.[108] It is important to note that the ICC was created by the Rome Statute which is a multilateral treaty, it thus ordinarily follows that the Court operates within the provisions of the Rome Statute. When the Security Council refers a non-party state to the ICC, it means that it allows the ICC to act outside the Rome Statute. The consequences of this action are that it violates the state's sovereignty and violates the international principles of treaty law.[109]
Therefore, the Security Council's powers under Article 13 (b) are absolute in that they cannot be limited by the provisions of the Rome Statute.

While the UN Charter permits the UN Security Council to compel or restrict actions by bodies dealing with issues of peace and security, the Charter does not in any way allow international

[103] United Nations International Criminal Tribunal for Rwanda *Est* 1994; International Criminal Tribunal for the Former Yugoslavia, *Est 1993*
[104] Zacklin R, *The failings of ad hoc International Tribunals*, Journal of International Criminal Justice 2, 2004, 542
[105] *N*57, *supra*
[106]Machteld Boot *Nullum Crimen Sine Lege and the Subject Matter of the International Criminal Court: Genocide, Crimes Against Humanity, War Crimes* 2002, 371.
[107] Lee A. Casey and David B. Rivkin Jnr, The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties, Virginia Journal of International Law, 2004. 64-87
[108] *ibid*
[109] Steffen Writh Immunities, related problems, and article 98 of the Rome Statute *Criminal Law Forum Dordrecht*, Vol 12, 2001, 492.

organizations to act outside the scope of their constituent documents.[110] It is argued that the intention of the legislature when it enacted Article 13 (b) of the Rome Statute was to allow the ICC to act on Security Council referrals, while at the same time leaving broad discretionary powers of the Security Council untouched.[111]

2.4.1 ARTICLE 13(b) AND ENFORCEMENT OF THE ROME STATUTE

The effectiveness of the ICC is measured by states co-operation.[112] States party to the Rome Statute have a duty to comply with the decisions of the Court. This is not so with non - state parties but the problem arises where jurisdiction is imposed upon such non state parties by the UN Security Council. The ICC does not have the requisite resources to enforce its decisions or co-operation with the same. Co-operation is borne through the obligation that binds state parties.[113] But what about situations where the UN Security Council has referred a non - state party to the ICC? A non-state party is not bound by the Rome Statute and has no responsibility to cooperate hence it will be difficult for the ICC to enforce its decisions. The ICC would require the involvement of the UN Security Council to enforce its decisions. The Security Council may do this by imposing a specific obligation on the state in the referral resolution[114]. Even though state parties have a responsibility to cooperate, they may decline to do so in the event that a prior or parallel agreement exists between the declining state and another state that would be breached by the required cooperation. This is in terms of Article 98 of the UN Charter.[115]

The ICC has faced difficulties in securing arrests and collecting evidence in light of lack of a responsibility to cooperate in respect of non - state parties. This is exacerbated by the uncertainty that surrounds the duty of state parties on one hand wherein they are dutybound to cooperate and on the other hand, Article 98 which provides exceptions that take away this responsibility to cooperate.[116] The Dufur situation is pertinent in this regard. Since the indictment of Al Bashir, African states took a deliberate decision not to comply with the request by the ICC to arrest Al Bashir if he visited their countries.[117] A few examples that demonstrate this resistance are how countries such as South Africa, Djibouti, Uganda and Jordan among others failed to apprehend Omar Al Bashir when he visited those countries. The attitude of these countries will be discussed in detail in Chapter 3.

2.5 REFFERALS, STATE SOVEREIGNTY AND ENFORCEMENT

[110] Max du Plessis *African guide to international criminal Justice* 2008 19.
[111] *ibid*
[112] Courtney Hillebrecht and Scott Straus, Who Pursues Perpetrators? State Cooperation with the ICC, Human Rights Quarterly, Johns Hopkins University Press, 2017. 167-171
[113] *ibid*
[114] A. Sheng, Analyzing the International Criminal Court Complementarity Principle Through a Federal Court Lens, ILSA Journal of International and Comparative Law, 401,2007
[115] The United Nations Charter, *ibid*
[116] N41, *supra*
[117] *N*105, supra. P179

The issue of co-operation with the Court is a very practical one that concerns state sovereignty. Treaties are binding in principle only on state parties. For non-party states, there is neither harm nor benefit in them (*pacta tertiis nec nocent nec prosunt*).[118] Therefore, according to the general principle of the law of treaties as embodied in the Vienna Convention on the Law of Treaties, the obligation of non-party states to cooperate differs from that of state parties.[119] Article 87(5)[120] is a provision on cooperation by non-party states with the ICC. It stipulates that the Court ‘‘may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.’’[121] Article 34 of the Vienna Convention on the law of Treaties clearly provides that a treaty does not create either obligations or rights for a third state without its consent.[122] For this very reason, that is why the Rome Statute precisely makes different provisions for state parties and for non-party states on the issue of state co-operation. To state parties, the ICC ‘‘is entitled’’ to present ‘‘co-operation requests’’ and they are obliged to ‘‘co-operate fully’’ with it in ICC investigations and prosecutions of crimes. But as for non-party states, the ICC only ‘‘may invite’’ them to ‘‘provide assistance’’ on the basis of an *ad hoc* arrangement.[123]

A state which becomes party to the Rome Statute thereby accepts the jurisdiction of the Court with respect to the said crimes; a state not party may accept by declaration the exercise of jurisdiction by the Court with respect to the crime concerned.[124] The Court may exercise jurisdiction as long as the state on the territory of which the crime occurred, or the state of which the person accused of the crime is a national, is party to the Rome Statute or is a state not party thereto that has accepted the Court’s jurisdiction. For the ICC to exercise its jurisdiction, not only can the Court Prosecutor trigger the investigation and prosecution mechanism, but state parties and the UN Security Council can also do so by referring situations to the ICC in which one or more crimes have occurred.[125] Since the states, whether party to the Rome Statute or not, are all essentially members of UN agencies, when the UN Security Council refers a case to the Court for investigation and prosecution, it involves the UN member states. In other words, it involves the obligation to cooperate of both state parties and states not party to the ICC.[126]

2.5.1 SUDANEESE REFERRAL *VIZ* ENFORCEMENT

[118]Bowd, R. *Understanding Africa's Contemporary Conflicts: Origins, Challenges and Peacebuilding*. Ethiopia Institute for Security studies, 2010. 403
[119] Preamble to the Vienna Convention on the law of Treaties, 1980
[120] Article 87(5) of the Rome Statute, *ibid*
[121] *ibid*
[122] Article 34, n50. *Supra*
[123] N51, *supra*
[124] Ibid., Article 12, para. 3.
[125] Article 12 (3); Article 13 (b) of the Rome Statute, *ibid*
[126] M. Glasius. The International Criminal Court: A Global Civil Society Achievement. Oxford/New York: Routledge. 2006. 54-55

In view of the war crimes and crimes against humanity that had occurred in the Darfur region of Sudan, the International Commission of Inquiry submitted a report to the UN Secretary General in January 2005. In it the Commission recommended that the Security Council refer the situation in Darfur to the ICC, because ‘‘the Sudanese judicial system is incapable and the Sudanese government is unwilling to try the crimes that occurred in the Darfur region and to require the perpetrators to assume the accountability for their crimes.’’[127] Upon receiving the report the UN Security Council, adopted Resolution 1593 on 31 March 2005, in which it decided to ‘‘refer the situation in Darfur since July 2002 to the ICC Prosecutor.’’[128] The Security Council further decided ‘‘that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to co-operate fully.’’[129] Despite this Security Council decision that compelled cooperation, the situation in Darfur, Sudan has been particularly affected by instances of non-cooperation. ICC judges have already made several findings of non-cooperation in the case against Sudanese President Omar al-Bashir, in each instance related to the non-arrest of al-Bashir.[130] Discussions and activities around non-cooperation in 2017 once again revolved around failures to execute al-Bashir’s 2009/2010 ICC arrest warrant, following judicial findings in July 2016 of non-cooperation by Djibouti and Uganda in the same regard.[131]

2.6 CONCLUSION

The Rome Statute is a multilateral treaty. This means that it binds only the states that would have ratified it. Article 13 (b) of the Rome Statute however allows the UN Security Council to confer jurisdiction on the ICC over even those states that are not party to the Rome Statute. This provision is expressly in conflict with customary international law; more particularly the rule of *pacta tertiis nec nocent nec prosunt.* This rule provides that “a treaty does not create either obligations or rights for a third State without its consent.”[132] In terms of the pacts tertis rule of customary international law, a treaty is forbidden from violating the rights of third states not party to a treaty. The imposition if the ICC’s jurisdiction over nationals of states who are not state parties to the Rome Statute ultimately results in the interaction with the principles of

[127] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General’’, 25 January 2005, at, http://www.un.org/News/dh/sudan/com_inq_darfur.pdf. (Last visited 1 March).
[128]Security Council Resolution 1593 of 31 March 2005, para. 2.
[129] *ibid*
[130] Huneeus, Alexandra Valeria, Compliance with International Court Judgments and Decisions. Oxford Handbook of International Adjudication, 2013, Univ. of Wisconsin Legal Studies Research Paper No. 1219, Available at SSRN: https://ssrn.com/abstract=2198595
[131] R. Cryer, Sudan, Resolution 1593, and International Criminal Justice, Leiden Journal of International Law, 2006, 195.
[132] Tolbert David, *International Criminal Law: Past and Future*, 30 U. PA Journal of International Law, p 1281, 2009

sovereignty and equality of states.[133] It may however be counter-argued that the exercise of criminal jurisdiction over nationals and territories of States neither party to the Statute nor consenting to the ICC does not create any obligation for other States than for the ICC itself.[134] The non-party States implicated in a prosecution may refuse to consent to any request for cooperation, and, indeed, the Rome Statute does not oblige them to do so.[135] The selective practice that the UN Security Council employs through both the Article 13 referrals and Article 16 deferrals interferes with the judicial independence of the ICC.

[133] *N*105, *supra*
[134] W. A. Schabas, An Introduction to the International Criminal Court, Oxford University Press, 239, 2011
[135] Nsereko, *ibid* at 279

CHAPTER 3 – THE REFERRAL POWERS OF THE UN SECURITY COUNCIL UNDER THE ROME STATUTE

3.1 INTRODUCTION

One of the criticisms that has been levelled against the referral powers is the argument that, the Security Council, which is a political body, should not have powers to interfere with the work of a judicial body, as an independent and impartial arbiter.[136]

Furthermore, the referral powers of the Security Council have been criticized as lacking legitimacy. This lack of legitimacy, it is argued, arises from the fact that some countries which are members of the Security Council, are not State parties to the Rome Statute. These countries, however, participate in the referral of situations to the ICC.[137] The United States of America is one such country. Ironically, the United States itself has adopted domestic legislation which allows it not to co-operate with the I.C.C, the so-called 'Hague Invasion Act. This Act penalizes any country that hands over a US-citizen to the ICC.[138]

So opposed to the ICC, is the USA, that it has gone as far as imposing sanctions on the former ICC Prosecutor, Professor Fatou Bensouda, after she, *proprio motu* initiated investigations into alleged war crimes committed by the US military in Afghanistan. The USA's opposition to the ICC has also manifested itself through the threats of arrest of ICC judges made by the USA. In essence, to have a country so opposed to the ICC, itself participating in referring cases to the same court has been viewed by many States as exhibiting double-standards thus undermining the legitimacy of the Court.

Furthermore, the Security Council has been criticized over the manner in which it refers cases to the ICC. A good example is the Al Bashir case. The referral was out-rightly opposed by the AU. It is argued that it negated peace-building initiatives that had been commenced by the Sudanese government and African States through the AU and IGAD.[139] There was need to give peace a chance whilst deferring the pursuit of justice.

3.2 THE DARFUR SITUATION-A HISTORICAL BACKGROUND

The Darfur situation arose from a civil war that occurred in Sudan. From around March 2003 to at least 14 July 2004, a protracted armed conflict of an international character existed in Darfur between the Government of Sudan led by President Omar Al Bashir and several armed rebel groups, in particular, the Sudanese Liberation Movement/Army (SLM/A) and the Justice and

[136] F.T Endoh Justice Without Peace or Political Compromise, African Security Review, 2016, 257-8
[137] T.E Fabrice, The Efficacy of the United Nations in Conflict Resolution: A Study of the Response of the Security Council to the Dafur Conflict in Sudan, Mediterranean Journal of Social Sciences, 2014, 231
[138] F.T Endoh (Ibid)
[139] Edward Elgar, The International Criminal Court: A Postcolonial Tool for Western States to Control Africa, Journal of International Criminal Law, Vol 1, 2020, 1196

Equality Movement (JEM).[140] The conflict pitted the predominantly African rebel groups from the sedentary agricultural population who protested against marginalization and unfair treatment by the predominantly Arab-led Sudan government. The Rebel militia groups mounted a series of attacks on government installations. In retaliation, the Sudanese government mounted devastating and indiscriminate aerial strikes on the rebel strongholds killing innocent civilians.

The Sudan government began to supply Arab Militias, commonly referred to as Janjaweed, with arms and intelligence. These Arab militias carried devastating strikes on the rebel groups and their strongholds. They routed the SLA and conducted what was described by international observers as an ethnic cleansing of the Fur, Masalit, and Zaghawa peoples.[141]

The attacks by the Janjaweed attracted international attention and severe criticism and condemnation. The United States condemned the attacks and characterized them as genocide.[142] Consequently, the United Nations Security Council expressly resolved that the Darfur situation was an international peace and security issue warranting its intervention.[143]

Acting under its powers in terms of Chapter VII of the United Nations Charter, the Security Council under Resolution 1564, requested the Secretary-General of the UN to rapidly establish an international commission of inquiry to immediately investigate reports of violations of international humanitarian law and human rights by all parties involved in the Darfur civil war.

The International Commission of Inquiry in its report concluded that,

"…in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law. Even assuming that in all the villages they attacked there were rebels present, or at least some rebels were hiding there, or that there were persons supporting rebels - a fact that the Commission has been unable to verify for lack of reliable evidence - the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack."[144]

Flowing from the recommendations of this Commission of Inquiry, the Security Council thus referred the Darfur situation to the International Criminal Court under Resolution 1593 in terms of Article 13 of the Rome Statute. As has already been alluded to in Chapter 2, the referral of the Darfur situation by the Security Council was not without controversy. Unsurprisingly, it attracted severe criticism from Sudan and faced stiff resistance from the African Union.

3.3 THE ISSUANCE OF THE ARREST WARRANT AGAINST AL BASHIR

[140] Case Information Sheet, *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09,
[141] https://www.britannica.com/topic/Janjaweed
[142] https://www.hrw.org/legacy/wr2k5/darfur/4.htm
[143] Resolution 1556 (30 July 2004)
[144] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva, 25 January 2005

In 2008, The Prosecutor of the ICC, Luis Moreno Ocampo, applied to the Pre-Trial Chamber of the ICC for a Warrant of Arrest to be issued against Al-Bashir for genocide, crimes against humanity and war crimes committed in Darfur.

In general, the ICC Statute is inspired by the principle of complementarity, which in essence provides that the ICC will defer to domestic processes unless the State is unwilling or unable to prosecute the war crimes or has not established appropriate domestic mechanisms. In the Sudan situation, the Sudanese government had demonstrated a lack of will to prosecute suspects who were alleged to have committed war crimes. By way of illustration, the ICC had issued a warrant of arrest against Ahmed Haroun for his alleged role in the commission of war crimes in Sudan.[145] However, the Sudanese government had refused to comply with the arrest warrant. In fact, Haroun was a Minister in the Sudanese government tasked with Humanitarian affairs.

The Pre-trial chamber thus issued a warrant of arrest against Al-Bashir finding that there were "reasonable grounds to believe" (the standard necessary for issuance of an arrest warrant) that forces under Al Bashir had committed a variety of crimes against humanity, including pillage, murder, extermination, forcible transfer, torture, and rape against thousands of civilians in Darfur.[146] Specifically, the Pre-Trial Chamber found that, as the de jure and de facto President of Sudan and Commander-in-Chief of the Sudanese Armed Forces, there were reasonable grounds to believe that Al Bashir coordinated the design and implementation of the counter-insurgency campaign, or at a minimum that he was in control of all branches of the "apparatus" of the State of Sudan and used such control to secure the implementation of the counter-insurgency campaign.[147] The Pre-Trial Chamber found that there were reasonable grounds to believe that Al Bashir had committed crimes against humanity and war crimes. The Chamber however, dismissed the Prosecutor's application as it related to the charge of genocide.

On the 6th of July 2009, the Prosecutor appealed against the Pre-Trial Chamber's decision not to issue a warrant of arrest against Al Bashir in respect of genocide. On the 3rd of February 2010, the Appeals Chamber found that there were reasonable grounds to believe that Al Bashir had committed the crime of genocide. Consequently, a second warrant of arrest was issued against Al Bashir on the charge of the crime of genocide.[148] The two arrest warrants remain extant.

Unsurprisingly, the issuance of the Arrest warrant against Al-Bashir attracted severe criticism from the Sudanese government and its population.[149] In retaliation to the issuance of the arrest warrant against Al Bashir, the Sudanese government responded by eliminating several non-

[145] *The Prosecutor v Ahmad Muhammad Harun* ICC-02/05-01/07
[146] M. Scharf, *Introductory Note to the International Criminal Court's Arrest Warrant for Omar Al-Bashir, President of the Sudan,* Hein Online, 2009
[147] Ibid
[148] Case Information Sheet, *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09
[149] https://www.nytimes.com/2009/03/05/world/africa/05court.html

governmental organizations involved in humanitarian work and threatened to withdraw its consent to the joint UN-AU Peace-keeping Mission in Darfur.[150]

3.3.1 South Africa

South Africa was one of the leading countries on the African continent in the negotiations for the establishment of the ICC. In fact, it is one of only four countries on the continent that has domesticated some provisions of the Rome Statute through the *Rome Statute Implementation Act* No. 27 of 2002.

Sometime in 2015, South Africa hosted the AU Summit of the Heads of State which was also attended by Al Bashir. Prior to the summit, several meetings had occurred between the South African Embassy in the Netherlands and the ICC. The South Africa government had requested the meeting for consultations pursuant to Article 97 of the Rome Statute.[151] The Court however reiterated to South Africa that all the issues it had tabled had been dealt with before by the Court and that, further, the consultations would not suspend the obligation of South Africa to execute the warrant of arrest once Al Bashir arrived on South African territory.[152]

Notwithstanding the Court's position at the consultations, Al Bashir attended the AU Summit in South Africa but was not arrested. Consequently, South Africa was brought before the ICC for a decision on non-compliance in terms of Article 87 (7) of the Rome Statute to be made. At the hearing of the matter, South Africa raised a plethora of preliminary points but however, essentially, its submission was that Omar Al-Bashir enjoyed immunity from criminal proceedings, including from arrest, under customary international law, and that since that immunity had not been waived by Sudan or otherwise, the Court was precluded by article 98(1) of the Statute from requesting South Africa to arrest and surrender Omar Al-Bashir and, consequently, South Africa was not obliged to arrest Omar Al-Bashir and surrender him to the Court.[153]

After considering submissions by both the Prosecutor and the South African government, the ICC found that South Africa had failed to comply with its obligations under the Statute by not executing a request by the Court for the arrest and surrender of Omar Al-Bashir. The ICC however, declined to refer its decision on non-compliance of South Africa to the ASP or the Security Council on the basis that domestic Courts in South Africa had already found that the

[150] Scharf (Ibid)

[151] Article 97 of the Rome Statute allows State parties to consult with the Court where there is an issue that may cause that state to fail to comply with a request in terms of the Statute.

[152] Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir No. ICC-02/05-01/09

[153] Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, No. ICC-02/05-01/09

government had failed to execute its obligations. Referral to ASP or SC would also not likely encourage the co-operation of South Africa.[154]

The ICC further made a finding that Article 27 (2) of the Rome Statute does not exclude sitting Heads of State from the jurisdiction of the Court. In buttressing this position, the Court held that,

"The Chamber does not subscribe to this view and finds that article 27(2) of the Statute also excludes the immunity of Heads of State from arrest. First, the Chamber considers that since immunity from arrest would bar the Court from the exercise of its jurisdiction, the general exclusionary clause of article 27(2) of the Statute, in its plain meaning, also encompasses that immunity. Had the drafters of the Statute intended exclusion only of a narrow category of immunities, they would have expressed it in plain language. The language used in that provision, however, conveys comprehensiveness and is not compatible with the proposition that the immunity from arrest of Heads of State is excluded from it."[155]

In simple terms, the Court found that State parties cannot invoke immunity of heads of state as a basis for failing to execute the request of the Court.

3.3.2 Djibouti

In 2016, the Chamber of the ICC received information from the Registry that Omar Al Bashir had visited the country of Djibouti for the inauguration of President Ismail Omer Gaili. The Chamber therefore invited Djibouti to make presentations on its non-compliance with the Court's request for the arrest and surrender of Al Bashir, which request had been communicated to Djibouti prior to Al Bashir's visit.

The Djibouti government transmitted a *note verbale* to the Chamber essentially stating that,

"(i) it lacks the national procedures required under Part 9 of the Statute for the arrest and surrender of suspects to the Court, including Omar Al-Bashir;

(ii) article 98(1) of the Statute precludes the arrest and surrender to the Court of Omar Al-Bashir since he is entitled to immunity as a serving Head of State;

(iii) Djibouti, as a member of the African Union, must respect the decision of the African Union directing its member states, in accordance with article 98 of the Statute, not to cooperate with the Court's request for arrest and surrender of Omar Al-Bashir to the Court;12 and

(iv) within the context of the Intergovernmental Authority on Development (IGAD), Djibouti is part of the peace process in the Republic of the Sudan and the Republic of South Sudan."[156]

Despite these compelling submissions by the government of Djibouti, the Chamber found that pursuant to Article 87 (7) of the Statute, Djibouti had failed to comply with the request of the

[154] Ibid

[155] Paragraph 73 (Ibid)

[156] Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute ICC-02/05-01/09

Court for the arrest and surrender of Al Bashir to it. The Chamber further referred Djibouti's non-compliance to the Assembly of State Parties and the UN Security Council. The basis for the Chamber's decision was that Djibouti as a State party to the Rome Statute had an obligation upon request by the Court to arrest and surrender Al Bashir to the ICC.

3.3.3 Uganda

In 2016, acting on media reports that Omar Al Bashir was travelling to Uganda for the inauguration of President Yoweri Museveni, the Registry of the ICC transmitted a *note verbale* to the Government of Uganda, reminding of its obligations as a State Party to the ICC, to arrest and surrender Al Bashir to the Court. The same *note verbale* also reminded Uganda of its obligation to consult the Court in terms of the Rome Statute should there be any challenges or impediments in arresting and surrendering Omar Al Bashir to the Court.

It later emerged that Al Bashir had indeed visited Uganda for the inauguration. The ICC thus invited Uganda to make representations on its failure to comply with request by the Court for the arrest and surrender of Al Bashir.

In its submissions to the Court, the Government of Uganda essentially argued that,

"i) the invitation to President Al-Bashir was informed by the standpoint that good relations with all countries in the region is essential to the maintenance of peace and security and that continuous engagement of all the leaders, Al-Bashir included, is both important and unavoidable"; and

(ii) the African Union Assembly of Heads of State and Government had decided that the African Union member states, in accordance with article 98 of the Statute concerning immunities, shall not cooperate with the Court's request for arrest and surrender of Omar Al-Bashir to the Court."[157]

The ICC however, in finding against Uganda, held that, pursuant to Article 87 (7) of the Rome Statute, the Government of Uganda had failed to comply with the Court's request for the arrest and surrender of Omar Al Bashir. The Court further held that the Uganda be referred to the Assembly of State Parties and the United Nations Security Council.[158]

In making the above finding, the Court stated that Uganda as a State party to the Rome Statute, had an obligation to arrest and surrender Omar Al Bashir to the Court. It further reasoned that, notwithstanding that the Registry had transmitted Uganda a *note verbale* reiterating Uganda's obligations, the Government of Uganda had failed to respond to same.[159] Uganda had also failed in terms of its obligations to consult with the Court in terms of Article 97 of the Rome Statute.[160]

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[157] Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute No: ICC-02/05-01/09

[158] Ibid

[159] Ibid

[160] Ibid

On these grounds, the Court found Uganda non-compliant with its request for the arrest and surrender of Omar Al Bashir.

3.3.4 Jordan

Sometime in 2017, the Registry of the ICC acting on information it had received that Omar Al Bashir would attend the Arab League Summit in Jordan, wrote *note verbale* requesting the Hashemite Kingdom of Jordan to provide information on Al Bashir's visit and further calling upon the Jordan government to execute the arrest warrants against him.

The Jordan government responded via a *note verbale* confirming the Sudanese government's attendance at the summit but further stated that it was unsure whether Al Bashir would attend. The Jordan government however, later, sent a second *note verbale* confirming Al Bashir's attendance. Consequently, the government further stated that it was consulting with the ICC in terms of Article 97 of the Rome Statute.

The *note verbale* further stated that Jordan considers that "President Omar Al Bashir enjoys sovereign immunity as a sitting Head of State under the rules of customary international law" and that that immunity had not been waived by Sudan nor by the Security Council of the United Nations in its resolution 1593(2005).[161] Making reference to articles 98(1) and 27(2) of the Statute, Jordan concluded that "[n]othing in the two articles mandates the State Party to the Rome Statute to waive the immunity of a third State and act inconsistently with its obligations under the rules of general international law on the immunity of a third State.[162]

Omar Al Bashir subsequently attended the Arab League Summit in Jordan in 2017 but was not arrested and brought before the ICC. Consequently, Jordan was brought before the Court for a decision on its non-compliance with a request of the Court to be made in terms of Article 87 (7) of the Rome Statute.

In its submissions before the Court, the government of Sudan persisted with the argument it had made in its *note verbale* to the Registry that Al Bashir had head of State immunity under customary international law and under the Arab League 1953 Convention. It further argued that, Sudan had no consented to the surrender of Al Bashir under Article 98(2) of the ICC Statute.

The Pre-Trial Chamber thus made a finding that Jordan had failed to comply with its obligations under the Statute. The non-compliance was further referred to the Assembly of State Parties and the United Nations Security Council.[163]

This was not to be the end of the matter however. The Jordan government appealed against the Pre-Trial Chamber's decision to the Appeals Chamber. The Jordan government raised essentially the same arguments on appeal as those in the Pre-Trial Chamber.

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[161] Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir No: ICC-02/05-01/09

[162] Ibid

[163] Ibid

Interesting to note however, is that the African Union was invited to make submissions in the Appeal. It is important to highlight the position of the AU here although it has been explained in the preceding paragraphs. This position can be summarized as follows, the Security Council Resolution referring the Darfur situation to the ICC did not remove the immunity of Al Bashir from prosecution. Secondly, Al Bashir enjoyed head of State immunity under Customary International law.[164] In concluding its submissions, the AU further stated that on account of Article 98 of the Rome Statute, neither Jordan nor any State had a duty to co-operate in the arrest and surrender of Omar Al Bashir.[165]

Despite strong arguments by Jordan and support from the AU, the Appeals Chamber dismissed the appeal and upheld the decision of the Pre-Trial Chamber.

The ICC made several other decisions on non-compliance of States such as Uganda, Chad and Egypt. The non-compliant countries were also referred to the Assembly of State Parties and the United Nations Security Council. It is critical to note that, the ICC has no enforcement mechanism of its own and thus largely relies on the ASP and the Security Council to enforce its decisions.

On all aforementioned instances, the ICC brought to the attention of the UN Security Council the presence of Al Bashir in the territory of a state party to the ICC and requested the Council to take any action it deemed necessary. However, the Council did not heed to this request and did not do anything to address the failure to uphold their responsibility to cooperate.

3.4 THE LIBYAN SITUATION – A HISTORICAL BACKGROUND

The struggle within the state of Libya has a long-standing history. It dates as far back as the 7th century where Libya was still under the rule of the Roman Empire and the Ottoman Empire respectively. With the arrival of Italian rule in Libya, the Libyan society got overwhelmed and therefore, a divided society was created and this sparked the conflict that has continued up to this day. In 1951, Libya attained its independence and became a sovereign state. However, the divisions that had been created within its society by imperialism were carried over into the new independent Libya.[166] Within the same decade, Libya held its first elections and elected Mohammed Idris as their king. At this time Libya was still a monarchy. Within a short period after the election of its first king, Libya discovered its oil and this boosted their economy. This development led to the withdrawal of foreign troops from Libyan territory and secured Libya

[164] The African Union's Submission in the "Hashemite Kingdom of Jordan's Appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir No: ICC-02/05-01/09".
[165] Ibid
[166] M. Du Plessis and A. Louw, Justice and the Libyan Crisis: The ICC's Role under Security Council Resolution 1970, ISS Africa Briefing Paper 2011, 1–2.

international aid from Britain and the United States. Despite having discovered oil in Libya, Mohammed Idris did not do much to improve Libya economically and politically.[167]

In 1969, there was a coup d'état in Libya which was led by Muammar Gadaffi. The coup *resulted* in the overthrowing of Mohammed Idris and established the Libyan Arab Republic on 1 September 1969. Muammar Gaddafi then became the commander in chief of Libya's armed forces and Libya was under his rule.[168] Soon after gaining power, Gadaffi became popular for his unorthodox political strategies. He changed the name of the state from the United Kingdom of Libya to the "People's Socialist Libyan Arab Jamahiriya" and this caused a lot of unrest and divisions within the Libyan community. It also caused a lot of tension with the neighboring and Western community.[169] By this, Muammar Gaddafi created an authoritarian regime which monopolized all positions of leadership and political power. Under this regime, the peoples did not have a right to change their government and there were gross human rights violations. Gaddafi manipulated the oil reserves in Libya and engaged in the funding of terrorist groups.[170] This drew the attention of the United States which responded by launching an airstrike over cities in Libya in 1986. He went on to launch attacks on Scotland, Berlin and Northern Africa. This led to the United Nations isolating Gadaffi both economically and politically by imposing sanctions on Libya in 1992.[171] However, in 2003, Libya took accountability for the bombings and undertook to compensate the victims, hence the sanctions were lifted.

In 2011, a revolution erupted in Libya. After forty-two years of Gadaffi's rule, there was eventually rebellion. The masses protested and Gadaffi responded by a brutal crackdown and this ignited a civil war.[172] A lot of atrocities were committed during this civil war and civilians were affected. This drew the attention of the international community and intervention was warranted.

3.5 ISSUANCE OF THE ARREST WARRANT AGAINST GADAFFI

The civil war that broke out in Libya on 17 February 2011 was characterized by a lot of civilian casualties. The rebels sought to overthrow Gadaffi while security forces retaliated by fighting back. The rebel groups were highly untrained and lacked the expertise to operate the sophisticated weapons and air planes they had captured.[173] The humanitarian crisis that ensued called for the intervention of the United Nations. The United Nations Human Rights Council conducted an inquiry into the human rights violations that were apparent in Libya. The United

[167] *ibid*
[168] T. Dunne and J. Gifikins, Libya and the State of Intervention, Australian Journal of International Affairs, 2011, 517-530
[169] *ibid*
[170] *ibid*
[171] *ibid*
[172] R. Kerr and E. Mobekk, Peace and Justice: Seeking Accountability after War Cambridge Polity Press, 2007, 107
[173] *Ibid*

Nations Human Rights Council moved to suspend Libya in February 2011 for using military force to indiscriminately attack civilians. The United Nations Security Council also established a Commission of Inquiry which found that there were human rights violations and war crimes were being committed in Libya.[174] In February 2011, the UN Security Council invoked its Article 13 (b) of the Rome Statute powers and adopted Resolution 1970 which authorized the prosecutor to conduct an investigation into the Libyan situation. The Resolution also included a travel ban, asset freeze, and arms embargo, making the ICC's investigation part of a larger package of international censure.[175] Acting under its Chapter VII powers, the UN Security Council went on to adopt Resolution 1973 in March 2011 which permitted intervention through military action in order to protect civilians. Initially, the military intervention was spearheaded by France and the United States but later it was handed over to NATO.[176]

Suffice to note that Libya is not and has never been a state party to the Rome Statute. As such, the Security Council's referral of the Libyan situation to the ICC Prosecutor was in accordance with its powers under Article 13 (b) of the Rome Statute. After having been satisfied that crimes falling within its jurisdiction had been committed in Libya, the prosecutor indicted Muammar Gaddafi, the then Libyan head of state, Saif Al-Islam Qaddafi, Muammar Gadaffi's son and Abdulla Al-Senussi, the chief of intelligence for Libya. The arrest warrant against Muammar Gadaffi was withdrawn following his death in the same year that it was issued.[177] This did not end the political instability in Libya as different political factions were vying for control of the state and thus affected co-operation in so far as the ICC Prosecutor's investigations were concerned.[178] Libya requested to try the remaining two suspects in their domestic courts. The judges of the ICC granted Libya's request to have the chief of intelligence prosecuted domestically but denied the trial of Muammar Gadaffi's son to take place in national courts.[179] However, the Libyan authorities have not handed him over to the ICC and the warrant of arrest against him remains outstanding.

3.6 THE POLITICS OF THE LIBYAN AND SUDANEESE REFERRALS

Although there admittedly was violence in Sudan in 2005 and in Libya in 2011, the referral of the situations to the ICC could not have been foreseen; Moreso because such violent protests had been evident in other states and the UN Security Council did not go as far as invoking its referral powers under the Rome Statute. After the adoption of Resolution 1970, both China and Russia gave explanations to justify the positions they had taken in support of the resolution. However, neither of them made mention of the need to involve the ICC in their explanations nor did they

[174] UN: Security Council Refers Libya to ICC', Human Rights Watch (27 February 2011)
[175]Unanimous Security Council vote a crucial moment for international justice', Amnesty International (27 February 2011)
[176]*ibid*
[177] G. Simpson, Law, War and Crime: War Crimes Trials and the Reinvention of International Law Cambridge: Polity Press, 2007, 98 - 103
[178] *ibid*
[179] *ibid*

expressly condemn Muammar Gadaffi and/or his government. The statements given by India also reflected that it had not anticipated a referral to the ICC as a possibility. Be that as it may, the Resolution was adopted by a unanimous vote.[180]

The referrals exposed the closeness of the relationship between the UN Security Council and the ICC despite the former being a political organ and the latter being an apolitical and independent judicial mechanism.[181] The relationship between the UN Security Council and the ICC has always been contentious from the onset. It has been argued that the Security Council has too much influence over the operations of the ICC and it being a political organ this would lead to the politicization of the Court and "would place international criminal justice at the whim of the Council's five permanent members."[182]

Resolution 1593 of 2005 and Resolution 1970 of 2011 which referred the situations in Darfur and Libya respectively to the ICC had the provision which rendered immune to prosecution or investigation those nationals who were involved in the conflict but their states of nationality were not parties to the Rome Statute.[183] Operative paragraph 6 of the Resolution 1970 reads:

"The Security Council … decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya 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 Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State."[184]

This exclusion highlights the inconsistencies of the attitude of the Security Council towards the ICC. The United States in particular insisted on the inclusion of this exclusion clause as a pre-condition for rendering its support for the referral.[185] It is paradoxical that the United States would support a referral to a court 'from which it had insisted its military personnel and political elite were immune.'[186] Furthermore, the exclusion clauses defeat the goal of the court of achieving universal jurisdiction.

Another controversial feature of these referrals was the reference to Article 16 of the Rome Statute in the preambles of both Resolutions.[187] Article 16 gives the Security Council power to suspend an investigation or prosecution for a renewable period of twelve months. Article 16 was included in the preambles of the Resolutions to mitigate against the fears of the international

[180] *ibid*
[181] A. Bellamy, Libya and the Responsibility to Protect: The Exception and the Norm', Ethics & International Affairs, 2011, 263–269.
[182] *ibid*
[183] M. Du Plessis and A. Louw, n31, *supra*
[184] Security Council Resolution 1970 – para 6
[185] M. Glasius, The International Criminal Court: A Global Civil Society Achievement Oxford/New York: Routledge, 2006, 47–60.
[186] *ibid*
[187] Resolution 1593 and Resolution 1970

world that the involvement of the ICC in the conflict situations in the referred states could thwart any possible chances of a peaceful political settlement. In this context, the prospect of an Article 16 deferral can be viewed as a leeway to efforts to negotiate peace.[188] Invoking Article 16 would seem in conflict with the objectives of the ICC to put an end to impunity and gives room to manipulation of the Court process by the Security Council. B. S. Brown has argued that the concern and controversy of the reference in the referral lies both in the possibility that it would set a precedent for subsequent referrals and that it may indicate that states consider Article 16 a viable option where political prerogatives would trump the aims of justice and accountability.[189]

Resolution 1970 which conferred jurisdiction to the ICC over Libya was coupled with a restriction in terms of its period of application. The Rome Statute allows the ICC to exercise its jurisdiction over crimes committed after the 1st of July 2022.[190] There is no known justification as to why the jurisdiction was limited to this period yet the conflict itself began prior to this date. What is apparent however, is that the Security Council agreed to this period for a reason.[191]

Commentators have concluded that this limitation was to prevent the exposure of the relations between members of the Security Council and Libya by having their affairs scrutinized judicially.[192] Security Council member states had been reported to have enjoyed political and economic relations with Gadaffi's regime in the years prior to the intervention. Documents were recovered by the Human Rights Watch which contained details of American and UK engagement with Libyan intelligence and anti-terrorism practices, including the extraordinary rendition of individuals to be interrogated and tortured.[193] From this perspective, it would not be farfetched that the Security Council wanted the demise of the Gadaffi administration in order to conceal their dealings with that regime. This is supported by how Resolution 1970 was fast tracked. The ICC referral was thus more political than judicial. It literally took a few months between the referral and the issuance of the arrest warrants; this is contrary to the Dafur situation which took two years from the adoption of the Resolution to the issuance of arrest warrants. The Security Council's referral was thus meant to provoke Gadaffi to 'fight to the death and take a lot of people down with him.'[194] The UN Security Council referral of Libya to the ICC thus fueled the commission of atrocities in Libya and as a result, Libya was in a long and protracted civil war as a result of Gadaffi's referral to the international criminal court.[195]

Following Gadaffi's death, there was a shift in the nature of the internal conflict in Libya. The rebels and the government had reached a deadlock and the conflict was slowly losing momentum. This led to the fall of the city of Tripoli and witnessed the NATO states that had

[188] G. Simpson, n42, *supra*
[189] Bartram S. Brown, International Criminal Law: Nature and Origins, London University Press, 2011 231
[190] The Rome Statute, *ibid*
[191] N54, *supra*
[192] UNSC refers situation in Libya to ICC, Sanctions Gaddafi and Aides, *Sudan Tribune*, (27 February 2011)
[193] *ibid*
[194] *ibid*
[195] R. Cryer, 'Sudan, Resolution 1593, and International Criminal Justice', Leiden Journal of International Law, 2006, 195–222.

intervened in Libya strategically placing themselves in positions that would enable them to benefit economically from the new Libyan rule.[196] The Security Council and other Western states thus abandoned their support for international criminal justice and pursued political and economic interests in the new Libya. The Security Council had instrumentalized the ICC and used it to marginalize and pressure Gadaffi, all in the name of justice; yet in actual fact, it was never justice but politics at play. In their quest to establish economic relations with the post Gadaffi Libya, the Security Council shifted goal posts and started singing a new song that recognized and respected the sovereignty of Libya. They emphasized that it was up to the people of Libya to decide their fate and argued that to go against this position "would patronize Libyans, deny them a right to establish their own accountability mechanisms."[197] This was inconsistent coming from states that had orchestrated the intervention prior to Gadaffi's death.

It soon became obvious that the intervening states had neglected their obligations under both Resolution 1970 and the Rome Statute. This was evidenced by the capture of Al- Senussi in Mauritania and his surrender to Libya.[198] The only issue that arose was France's insistence that he be extradited to France to be tried for a flight bombing that had occurred in 1982. France never suggested referring Al- Senussi to the ICC despite it being a member of the Court. The other permanent members also remained silent and never advocated for the surrender of Al-Senussi to the court.[199] This shows that the ICC had suffered the same fate as that of Gadaffi, being used and later on marginalized by the big powers.

Another example is the visit by Al-Bashir to Libya in 2012. Despite being wanted by the ICC for prosecution, none of the Security Council spoke up about Bashir's visit. They did not condemn it and did not take any action to facilitate his capture and surrender to the ICC. This illustrated that the interests and priorities of the Security Council were no longer the same.[200]

In respect of the warrant of arrest against Al Bashir, the African states he visited did not execute the warrant of arrest against him despite being well aware that he was sought after by the ICC. The Security Council itself did not do anything to assist the ICC in bringing Al Bashir to the custody of the court or to punish those states which had neglected their duty to cooperate with the ICC. Suffice to note that these states are parties to the Rome Statute and they have a positive duty to cooperate with it when called upon to do so. This again confirms that the priorities of the UN Security Council members had shifted as they were no longer concerned with ensuring that Omar al Bashir was brought to book. Under the circumstances, the reasoning that the referral was made in a bid to assert their power and control over African states would not be farfetched. It is important to note that Al Bashir's referral was the first ever referral by the Security Council.

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[196] R. Cornwell, World Powers Scramble for a Stake in Future of the New Libya, *The Independent,* 23 August 2011

[197] *ibid*

[198] L. Harding and I. Black, 'Mauritania Extradites Gaddafi Spy Chief Senussi to Libya', *The Guardian*, 5 September 2012.

[199] *ibid*

[200] M. Freeman, Necessary Evils – Amnesties and the Search for Justice, New York: Cambridge University Press, 2009, 81.

It was thus important for them to ensure that the matter was prosecuted to finality in order to set a precedence that these referrals fall through and the arm of the ICC does indeed extend to non - party states. To then engage in a piece meal referral simply depicts the unwarranted interference by the ICC by the UN Security Council as well as the abuse of court process by the same to achieve their political and economic goals.

In commenting about the Libyan referral, Mark Kersten has said the following:

"The possible effects and contributions of the ICC during the Libyan Revolution were ultimately shaped and even determined by the political prerogatives and interests of the Security Council and NATO powers. Commitment to the ICC's mandate was heeded only insofar as it advanced the political aims of the intervening powers, namely the marginalization of Gaddafi. Once the Court stopped serving these interests, its work was of limited value. The relationship between the ICC and those who invoked it was thus not one of legal obligation, but rather political convenience."[201]

From the above, it is clear that the UN Security Council abuses its powers to further their political and economic interests.

3.7 NON -REFERRALS OF OTHER STATES

3.7.1 SYRIA

In March 2011, there was an uprising in Syria. The Syrian government used force against civilian demonstrators who were protesting for the president's resignation. The civil unrest spread throughout the whole country erupting into a civil war. The civil war was characterized by a lot of violence. Multiple rebel groups erupted and the war became more about civilians fighting each other than fighting against the government.[202] There was also foreign influence where foreign states were backing various rebel groups and offering monetary and weaponry support.[203]

Vast atrocities were committed in Syria during this civil war. There were reports of sexual violence, torture, murder, hostage taking, indiscriminate attacks against civilians and a lot more war crimes and crimes against humanity.[204]

Under the UN Charter, the United Nations Security Council is mandated to maintain international peace and security. The situation is Syria therefore warranted the interference the Security Council to restore peace. However, despite the magnitude of the atrocities that were committed in Syria, the Security Council has continuously neglected to uphold its duty to preserve the peace. The Security Council has not only failed to refer the Syrian situation to the

[201] Mark Kersten, Politics and legal pluralism: The ICC's intervention in Libya Cambridge University Press, (2015) 468

[202] E. O'Brian and A. Sinclair, The Syrian War: A Diplomatic History, Center on International Cooperation, 2011, 95

[203] *ibid*

[204] *ibid*

ICC but it has also failed to investigate the atrocities that were perpetrated against the people of Syria which in themselves are tantamount to a breach of the peace.[205]

It has been suggested within the Security Council to refer the Syrian situation to the ICC in terms of Article 13 (b) of the Rome Statute. However, the resolution could not be adopted because a unanimous vote was required; China and Russia vetoed this decision and voted against the said referral.[206] Of importance to note is that a single veto by at least one of the permanent members of the Security Council is sufficient to stop a referral. Russia and China vetoed at least four Security Council resolutions that were meant to bring justice to the people of Syria. Only two resolutions were adopted unanimously but these had no bearing on bringing the perpetrators of the injustices in Syria to book.[207] Russia's objection to the involvement of the ICC in the situation in Syria dates as far back as 2013. It described the referral as "ill-timed and counter-productive" and has maintained this position ever since. China has remained silent on the topic and both countries have not suggested alternative methods to restore and maintain peace in Syria.[208]

The Syrian uprising has set an example that the international community is not concerned with human rights abuses and other international crimes that take place in a state. A government can get away with mass murders and torture as well as using chemical weapons against its own people. Civilians can attack each other and violate women and children during war and all these acts will go unchecked.[209] The Syrian civil war also goes to illustrate how the Security Council's decision to refer a situation to the ICC are based on political convenience and not on legal norms or hard evidence.[210]

3.7.2 THE BURMA

The Burma also known as Myanmar, is a country in the south eastern region of Asia. It is surrounded by countries such as India, Bangladesh, Thailand and China. The country has been undergoing political turmoil until recently in 2015 when the opposition and the military came into agreement and elected a president.[211] The Burmese population is predominantly Buddhist with a majority of over eighty percent of the population while the remaining constitutes of minority groups. In a western province of the Burma called Rakhine State, the majority of the population are Buddhist Rakhine while the Muslim Rohingya constitute the rest of the

[205] C. Stahn, Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court, Journal of International Criminal Justice, 2005, 698–699

[206] J. Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court', The International and Comparative Law Quarterly, 2002, 91–117

[207] *ibid*

[208] *ibid*

[209] E. Saudi, Milestones in International Criminal Justice, Chatham House Meeting Summary: International Law Programme, 2011. 10

[210] *Ibid*

[211] Matthew J. Walton, Ethnicity, Conflict and History in Burma, Asian Survey, Vol 48: University of California Press, 2008. 889-910

population.[212] Due to the claim by the Rohingya that they historically belong to Rakhine State, there has been strained relationships between the Rakhine Buddhists and the Rohingya Muslims. This is often as a result of the continuous attacks on the Muslims by the Buddhists that has gone on for years. In 2005, the United Nations High Commissioner for Refugees reported a very high number of Rohingyas repatriations to Bangladesh due to the persecution they were suffering at the hands of the then military government.[213] It was evident that there was ethnic cleansing in the Burma. In 2015, the United State Department of State described the situation in the Burma as follows:

"The situation in Rakhine State is grim, in part due to a mix of long-term historical tensions between the Rakhine and Rohingya communities, socio-political conflict, socio-economic underdevelopment, and a long-standing marginalization of both Rakhine and Rohingya by the Government of Burma. The World Bank estimates Rakhine State has the highest poverty rate in Burma (78 per cent) and is the poorest state in the country. The lack of investment by the central government has resulted in poor infrastructure and inferior social services, while lack of rule of law has led to inadequate security conditions. Members of the Rohingya community in particular reportedly face abuses by the Government of Burma, including those involving torture, unlawful arrest and detention, restricted movement, restrictions on religious practice, and discrimination in employment and access to social services. In 2012, the intercommunal conflict led to the death of nearly 200 Rohingya and the displacement of 140,000 people. Throughout 2013–2015 isolated incidents of violence against Rohingya individuals continued to take place." [214]

The situation escalated in 2016 when a group of armed civilians rose in active revolt and attacked several police posts around the borders. As a result, nine police officers were left dead. Pursuant to the police posts attacks, the military engaged in a series of severe measures in the Rakhine State which involved mass killings and arbitrary arrests.[215] As this crackdown continued, casualties also shot up. Rohingya people were killed in their numbers and a lot more fled for refuge in neighboring countries such as Bangladesh. There were reports of sexual assault on women and children, gun shooting targeted on villages, houses were set on fire and children were burnt alive. In 2017, as the crackdown continued, over one million Rohingya people sought refuge in neighboring countries and this was reported as the "largest human exodus in Asia since the Vietnam war"[216]

[212] ibid
[213] *ibid*
[214] Atrocities Prevention Report, Archived 10 December 2019 at the Wayback Machine 17 March 2016, Bureau of Democracy, Human Rights, and Labor, Office of the Under Secretary for Civilian Security, Democracy, and Human Rights, United States Department of State. Retrieved 12 February 2017
[215] Eric Hobsbawm, The Nation as Invented Tradition, Oxford University Press, 1994. 97
[216] Leider, Jacques. Rohingya: The Name, The Movement and the Quest for Identity. Myanmar Egress and the Myanmar Peace Center. 2013. 200

At the height of the humanitarian crisis and genocide in the Burma, international intervention was warranted. Most international organizations heavily criticized the Burmese government for these atrocities. The then president of the United Nations, Kofi Annan visited the Burma and was concerned over the humanitarian crisis in the country. The United Nations also called for the Burmese government to take steps to end the genocide and human rights crisis.[217] This was as far as intervention by the international community went; more particularly the United Nations.

The Security Council, which is the United Nations organ tasked with the maintenance of international peace and security did not intervene in the Burmese situation. Despite the confirmed reports that there was ethnic cleansing and genocide as well as other human rights violations in the Burma, the Security Council was not moved. The Security Council had previously referred Sudan and Libya to the ICC. As such referring the Burma was also an option which was however never explored. In as much as it can be argued that the previous referrals had been total fiascos, it would still have been prudent for the Security Council to exhaust this avenue. This would have paved way for the United Nations General Assembly to launch an investigation into the Burmese situation (as it did after the Syrian referral had been a flop).[218]

The lack of concern by the Security Council over the Burmese situation is just but appalling. Human rights violations of such a renowned magnitude took place in the Burma and the Security Council did nothing. One then wonders why it was so quick to act in the Libyan situation and in the Burmese situation it turned a blind eye. Could this be because the Security Council had no economic or political interests in the Burma or had something to gain by not referring the Burma to the ICC? The indiscriminate exercise of the Security Council's Article 13 powers leaves a lot to be desired. It is not known why the issue of referring the Burma to the ICC was never raised; or at the very least, the creation of an ad hoc or hybrid court to deal with the situation. This just shows that the Security Council exercises its power without consistency and is driven by political will. The tenets of international law demand that the principle of equality be applied and like situations be treated in the same manner.[219] The question why the Security Council did not interfere in the Burmese situation remains unanswered. The only logical explanation is that their political and economic aspirations did not require the Security Council to act.

3.7.3 RUSSIA

Russia and Ukraine had both been members of the Soviet Union prior to its dissolution. After its dissolution in 1991, the two countries retained their close relations. In 1994, Russia, United Kingdom and the United States agreed to recognize Ukraine as a politically independent state and to uphold its territorial integrity. This was after Ukraine had allowed for the removal of all nuclear weapons from its territory.[220] However, Professor Paul D'Anieri has remarked that from

[217] Lian H. Sakhomg, Burmese Politics: The Dilemma of National Unity, Copenhagen: Nias Press, 200. 209
[218] *ibid*
[219] ibid
[220] McDermott, Roger N. Brothers Disunited: Russia's use of military power in Ukraine, London University Press, 2016. 113

the time of the separation of Russia and Ukraine in 1991, Russia had never made peace with it and has been attempting to bring Ukraine under its control again.[221]In 2008, Ukraine sought to join NATO. There was resistance to this request more especially from France and Germany and Ukraine was ultimately denied membership. Russia had concerns over the envisaged admission of Ukraine into the NATO. It felt that Ukraine was geographically too close to Russia and its admission would give NATO powers access into Russian territory and this would compromise Russian national security. In 2009, Yanukovych won the presidency in Ukraine and in 2013, he refused to sign an agreement which established political and economic ties between Ukraine and the European Union. Instead, he preferred to have close ties with Russia. This led to protests in Ukraine.[222] The protests went on and spilled into 2014 which witnessed the fleeing of Yamukovych from Russia and the adoption of new bills which took away the official status from the Russian language. This did not go down well with the Russian speaking population in Ukraine and there were media reports in Russia of the impending endangerment that awaited the Russian population.[223] An interim government was established and elections were held early. A day after the elections, Yamukovych reappeared in Russia and declared that he was still the Ukrainian president. Almost at the same time, Russia was also beginning its military operations in Ukraine. By the end of 2014, Russia had annexed Crimea. In the same year, Ukraine also lost control of the provinces of Donetsk and Luhansk to Russia.[224] The conflict ended briefly following a ceasefire in 2015. However, there were reports of continued presence of Russian troops within the territory of Ukraine. The years between 2015 and 2021 were characterized by the presence of the Russian troops along the eastern border. The Minsk group attempted to end the conflict but it was unsuccessful.[225] At this stage, the Ukrainian population was developing an interest in joining NATO due to Russian attacks. In 2016, the conflict had intensified in Donbas. Russia launched cyberattacks on Ukraine including an attack on Kyiv's power grid which resulted in a total blackout. In 2017, Russia attacked Ukrainian infrastructure including its main bank.[226]

In 2019, Ukraine elected a new president, Volodymyr Zelensky. The conflict was still ongoing. In 2021, the tension escalated with Russia mobilized its troops, sending over 100 000 troops to Ukrainian borders.[227] President Zelensky engaged NATO and reiterated Ukraine's interest in getting membership. In December 2021, Russia demanded That NATO permanently bars

[221] Professor Paul D'Anieri. The Current Crisis with Russia: How Did We Get Here and Is There a Way to Prevent Other Confrontations Like This One? University of California. 2022, 11
[222] J.L. Johns, Michael. The Return of the Cold War: Ukraine, the West and Russia. London University Press. 2016 99–129.
[223] *ibid*
[224] *ibid*
[225] J.L. Johns, The Return of the Cold War: Ukraine, the West and Russia. New York: Tim Duggan Books, 2018. 91-96.
[226] *ibid*
[227] *ibid*

Ukraine from its membership.[228] Russia was determined to overrun Ukraine and overrun its government, ending for good its desire to join the Western defensive alliance of the NATO. After this demand was not met, Russia made a devastating attack on Ukraine in February 2022 and the conflict has been ongoing ever since[229].

The conflict was accompanied by casualties and gross human rights violations. An estimated number of 4000 civilian casualties occurred between 2014 and 2021. Movement was restricted in conflict zones; freedom of the press was also curtailed. Detainees were subjected to torture and ill-treatment and there were reports of sexual abuse of women and children.[230] The prognosis was bad and the situation called for international intervention.

3.7.3.1 RESPONSE OF THE UN SECURITY COUNCIL

It goes without dispute that war crimes, crimes against humanity and genocide were committed during the ongoing Russo-Ukrainian war. These are international crimes which call for the intervention of the United Nations Security Council and the International Criminal Court.[231] The Security Council is mandated under Chapter VI and VII of the UN Charter to take all necessary measures to maintain international peace and security.[232] It has already been established that the Russo- Ukrainian war poses a threat to international peace and security hence the intervention of the Security Council is warranted.

For the Security Council to act, it needs to adopt a resolution. The resolution has to get a positive vote from nine members out of the fifteen members of the Security Council. A negative vote from any one of the permanent members of the Security Council would bar the resolution from being adopted.[233] The five permanent members are Russia, China, United, States, United Kingdom and France. This means that Russia also has to vote in a decision that affects its military operations in Ukraine. A single negative vote from Russia is sufficient to stop the Security Council from acting in any manner. This just shows how thoroughly messed up and controversial the whole arrangement is. The power afforded to the Security Council under the UN Charter is absolute and tainted with politics.

The UN Security Council has a further prerogative of referring situations to the ICC acting under its Article 13(b) powers of the Rome Statute. The Court can only exercise its jurisdiction over nationals of state parties to the Rome Statute and those within whose territory the crimes were committed.[234] Russia is not state party to the Rome Statute hence the ICC cannot exercise its

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[228] Wong, Edward; Jakes, Lara (13 January 2022). "NATO Won't Let Ukraine Join Soon. Here's Why". The New York Times. Retrieved 12 March 2022

[229] The overview of the current social and humanitarian situation in the territory of the Donetsk People's Republic as a result of hostilities between 23 and 29 January 2021, "Human rights Ombudsman in the Donetsk People's Republic. Retrieved 3 June 2022.

[230] *ibid*

[231] Articles 5 -7 of the Rome Statute, ibid

[232] The United Nations Charter, 1945

[233] M. Du Plessis and A. Louw, n31, supra

[234] The Rome Statute, ibid

jurisdiction over it unless the Security Council refers the situation to the ICC. However, the resolution referring Russia cannot be adopted because Russia will veto it. A draft resolution has previously been submitted to the Security Council by the United States and Albania proposing to end Russia's military operations in Ukraine. The resolution did not succeed because it was vetoed by Russia.[235] This entails that the aggressor is being called upon to vote in a resolution that attacks its aggression. What is paradoxical about all this is that despite being a non-party to the Rome Statute, Russia has previously participated in the referral of Sudan and Libya which were both also not state parties to the Rome Statute. Effectiveness of the Security Council as a mechanism for maintaining international peace and security becomes questionable and respect for international law is lost.

Ukraine is equally not a state party to the Rome Statute. However, Ukraine accepted the court's jurisdiction by issuing a declaration under Article 12 (3) of the Rome Statute. What this entails is that the Court can exercise jurisdiction over Ukrainian nationals and over crimes committed on Ukrainian territory.[236] The prosecutor of the ICC has launched an investigation into the Russo-Ukrainian situation based on the Ukrainian declaration conferring jurisdiction on the court. Be that as it may, the problem that arises is that of cooperation. Even if the prosecutor concludes that international crimes were committed by Putin or other Russian top government officials, how will they be brought into the custody of the ICC for trial? The court cannot prosecute an accused person in absentia.[237] The ICC would be faced with the same fate it suffered in the case of Sudan. President Omar al Bashir remains wanted by the ICC and both state parties and non-state parties have not been forthcoming in respect of effecting his warrant of arrest despite being obliged to so by the Rome Statute.

3.8 CONCLUSION

In executing its duties, including the referral and non- referrals of situations to the ICC, the Security Council must demonstrate the utmost impartiality, Simpson has said the following about the operations of the Security Council:

"If the international legal order that the Security Council is mandated to uphold is a rule of law-based order, then it must ensure that like situations are treated alike; that norms are fairly applied to all, without fear or favor, and that SC action should follow irrespective of who the alleged perpetrator is, if the relevant criteria under the UN Charter are met, and if enough evidence of crimes under international law is available."[238]

[235] Kofman, Michael. Lessons from Russia's Operations in Crimea and Eastern Ukraine (Report). Santa Monica: RAND Corporation. 2017. 33–34.
[236] The Rome Statute, ibid
[237] *N*100, *supra*
[238] G. Simpson, n42, supra

The first Security Council referral took place in 2005 and the second occurred six years later in 2011. There have not been any referrals ever since then. This does not mean there has not been any atrocities that threatened international peace and security in the world. It means that the Security Council chose to turn a blind eye. It defies logic as to why the Security Council chose to refer Sudan and Libya and not the Burma, Syria and Russia, just but to mention a few.

Under the circumstances, it would not be farfetched to conclude that the issue of ICC referrals is a matter of politics and has nothing to do with justice or achieving international peace and security.

CHAPTER 4 – AFRICA, THE ICC AND THE UN SECURITY COUNCIL

4.1 INTRODUCTION

The United Nations Security Council adopted a unanimous decision to refer Darfur, Sudan to the ICC in 2005. In 2011, another unanimous decision was made to refer the Libyan situation to the ICC. These developments were well received by the international community.[239] It was believed that such initiatives would deter crimes. However, the African Community did not share the same sentiments. They viewed these referrals as political and a tool by the UN Security Council to perpetuate colonialism against African countries. Other states continue to act with impunity because as long as it not politically expedient that a referral to the ICC be made.[240] Several African countries are states party to the ICC; albeit they feel that investigations and prosecutions by the ICC are targeted at African states. Suffice to note that ten out of the eleven matters before the ICC are African countries and the only two referrals by the UN Security Council also happen to be African countries. Upon referring Libya to the ICC, the Security Council mentioned "widespread and systematic attacks" but they are not any more horrific than what has gone on in other states yet the cases were overlooked by the UN Security Council.[241] For example, over 7 000 Tamil civilians perished in Sri Lanka during the conflict between the government and the Tamil rebels and in Gaza, 1300 Palestinians perished in the internal conflict.[242] It therefore follows that the ICC and the UN Security Council are biased towards Africa. The UN Security Council enjoins the ICC in its pursuit of political objectives under the guise of legal moves.

4.2 AFRICA'S ATTITUDE *VIZ* THE UN SECURITY COUNCIL AND THE ICC

Since the ICC became functional, the Security Council has referred only two situations to the ICC, thus, Sudan and Libya and both are African states. What then boggles the mind is why the crises in Sri Lanka, Gaza, Iraq, Georgia, Colombia, Venezuela, Syria, Yemen and even Bahrain have not yet been referred to the ICC.[243] This selective process smacks of double standard and has placed Africa at loggerheads with the ICC. Some African states are under the impression that believe the ICC is an instrument used by the Security Council targeted at Africa which preclude Africa from solving its issues on a regional level.[244] Many scholars have however, counter-argued that it is incorrect to claim that the ICC has a particular interest in African situations. Most of the African situations before the ICC have been referred thereto by the states themselves on a voluntary basis, hence the ICC cannot be accused of exhibiting any bias. However, judging by inconsistencies manifest in the Security Council referral process, it goes without any doubt

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[239]Bowd, R. Understanding Africa's Contemporary Conflicts: Origins, Challenges and Peacebuilding. Ethiopia Institute for Security studies. 2010. 92

[240]*ibid*

[241] Gaub, F. A Libyan Recipe for Disaster. Survival: Global Politics and Strategy. Vol 56. 2014. 101-120.

[242] Bowd R. Note1, *supra*

[243] Roumani, J. Libya: Continuity and Change (review). The Middle East Journal, Volume 4, 2011. 681-682

[244] *ibid*

that the Security Council has a predilection for African crisis.[245] This is so particularly in light of the situations in Sri Lanka, Russia and the Burma to which the Security Council turned a blind eye despite the situations constituting international crimes and warranting referrals. It is only in African situations wherein the Security Council has political interests that it acts unanimously and speedily.[246]

In 2009, the ICC Prosecutor issued the first warrant against Omar Al Bashir, following a referral by the Security Council of the Sudanese situation. This meant that the ICC was asking Sudan to arrest and surrender to the custody of the Court its sitting president.[247] This sparked resistance from the African Union (AU) which made a request to the UN Security Council for the prosecution to be suspended in terms of Article 16 of the Rome Statute.[248] The Security Council did not heed this request. In the same year, a second warrant of arrest was issued against Al Bashir and this time it contained three counts of genocide. The AU once again made a request to the UN Security Council to have investigations and prosecutions on the matter deferred on the basis that Al Bashir's indictment could interfere with the peace process in Sudan and may even affect the stability of Africa generally.[249] Again, the Security Council turned a deaf ear to the plea of the African Union. Pursuant to the Security Council's refusal to exercise its Article 16 deferral powers, the African Union was dismayed and it held a meeting in 2009. At this meeting, the member states of the AU took a stance to frustrate the operations of the ICC by not executing the arrest warrant against Al Bashir[250]. This stance was adopted in a bid to compel the Security Council to give in to the AU's request to defer the investigation and prosecution of the Sudanese president and top government officials in the interests of peace. From the time that the AU adopted the resolution not to comply with the arrest warrant, several state parties of the Rome Statute have had Al Bashir present within the territory of their states but they have neglected their responsibility to cooperate by not arresting Al Bashir.[251] For instance, Chad and Djibouti both hosted Al Bashir when he attended the swearing ceremony of their respective heads of states while Kenya hosted him at the signing of the new constitution ceremony.[252] The ICC brought it to the attention of the Security Council at every instance that Al Bashir was present in the territory of a Rome Statute member state, but the Security Council did not react. What is paradoxical about this is that the ICC acted when requested by the Security Council to open investigations into the Darfur situation, but when the tables were turned and the ICC was requesting the Security Council to enforce the decision of the Court to arrest Al Bashir, the

[245] James Rosenau and Ernst-Otto Czempiel (eds.), *Governance Without Government: Order and Change in World Politics,* Cambridge University Press, 1991*,* 204
[246] *ibid*
[247] Charles C. Jalloh, Dapo Akandeb and Max du Plessis, Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court, African Journal of Legal Studies Vol 4(2011 7–19
[248] *ibid*
[249] *ibid*
[250] *ibid*
[251] *ibid*
[252] *ibid*

Security Council did not oblige. This just goes to show how the referral was never legal but political to begin with and how the Security Council uses the court to further its political and economic interests.[253]

4.2.1 KENYA

Kenya is a member state to the Rome Statute as it ratified the same in 2005. As such, it is bound by the jurisdiction of the Court under Article 12 of the Rome Statute.[254] Following the post electoral violence in Kenya in 2007, the Prosecutor of the ICC launched an investigation into the Kenyan situation in 2010. It found that the crimes against humanity had been committed in Kenya and indicted six Kenyan top government officials for these crimes.[255] This was the first ever case in which the Prosecutor opened an investigation proprio motu without having been referred to it either by a member state or by the Security Council.[256] Following the indictment, the African Union led by South Africa, made a request to the ICC to have the investigation and prosecution deferred in terms of Article 16 of the Rome Statute.[257] Article 16 confers power to the Security Council to suspend an investigation or prosecution that has already commenced or is about to be commenced by the ICC Prosecutor.[258] The Security Council again refused to exercise these powers indicating that there were no prospects that investigations or impending prosecutions would affect international peace and security.

Following the indictment of its top officials, the Kenyan government announced that it was going to prosecute the indicted persons in its national courts.[259] This was still not sufficient for the Security Council to defer the investigations or the prosecutions. Since the deferral is for a given period, this would have given Kenya a chance to try its nationals domestically thereby maintaining peace.[260] It is important to emphasize at this juncture that the ICC complements domestic courts therefore, it should only exercise its jurisdiction where local courts are unable or unwilling to carry out the prosecutions.[261] In the Kenyan situation, the local courts were willing to prosecute the government officials but the Security Council still refused to suspend ICC investigations and prosecutions. Had Kenya been a Western country, it is highly undoubtful that the Security Council would not have invoked its Article 16 powers to stop the investigations. The Security Council was not interested because the case involved an African country. Looking at the fact that this was the first ever case that the Prosecutor acted proprio motu and refusal by the

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[253] *ibid*

[254] Article 12 of the Rome Statute

[255] Weiss, T. (2014). The UN and the African Union in Mali and beyond: A shotgun wedding? International Affairs, Vol 4, 2014. 889-907. Retrieved June 3, 2022 from http://onlinelibrary.wiley.com

[256] *ibid*

[257] *ibid*

[258] *ibid*

[259] Coleman, P. Multiculturalism and Conflict. In The Handbook of Conflict Resolution: Theory and Practice (Third ed.). San Francisco: Jossey-Bass. 2014.. 54

[260] *ibid*

[261] William Schabas, The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, 2010. 333

Security Council to defer the Kenyan matter, it would not be farfetched to allege that Africa is a test case for the ICC and the both the ICC and the Security Council are biased towards Africa.[262]

4.3 THE POSITION OF THE AFRICAN UNION

The Darfur situation had been a cause for concern for the African states for a long time. The AU had made a number of initiatives to restore peace and security to Sudan. At the outset, the AU was committed to seeking a peaceful resolution of the crisis in Sudan. To this end, the AU initially sent a small mission to Darfur with UN Security Council endorsement, to monitor a ceasefire agreement between the rebels and the Sudanese government in 2004.[263] Beyond these peace-keeping initiatives, the AU favored a diplomatic approach to resolving the crisis.

The issuance of the arrest warrant against Al Bashir therefore came as a shock to the African Union member states. It was pointedly criticized and led to a dogged behavior of non-co-operation by African states. In a scathing criticism of the ICC and the Prosecutor of the ICC, the then Chairperson of the AU Commission, Jean Ping stated that;

> We have to find a way for these entities [the protagonists in Sudan] to work together and not go back to war … This is what we are doing but Ocampo doesn't care. He just wants to catch Bashir. Let him go and catch him … We are not against the ICC ... But we need to examine their manner of operating. There are double standards. There seems to be some bullying against Africa.[264]

The African Union's position was that the ICC was undermining rather than supporting efforts at restoring peace in Sudan. The African states thus adopted a resolution at a meeting of the Heads of State of the AU in Sirte on the 3rd of July 2009, where they resolved not to co-operate with the ICC in executing the warrant of arrest against Omar Al-Bashir.

The AU also requested the UN Security Council to defer the investigation of the Sudan situation for 12 months per its deferral powers in terms of Article 16 of the Rome Statute of the ICC.[265] However, the big powers refused to budge much to the ire of the African states. The African states argued that, a deferral, would give peace a chance whilst pursuing justice had potential to worsen the conflict in Sudan. Therein lay the debate between peace and justice. The reputation of the ICC therefore greatly diminished among African States and several cases of non-co-operation arose as will be demonstrated in the following paragraphs.

The issue of Head of State immunity from the jurisdiction of the ICC also reared its head after the arrest warrant against Al Bashir. The position of the African Union can best be summarized by

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[262] *ibid*

[263] A. Keith, *The African Union in Darfur: An African Solution to an African Problem?* Princeton University, 2007

[264] M. Du Plessis. *The International Criminal Court that Africa Wants,* Institute for Security Studies, 2010

[265] https://www.amnesty.org/en/latest/news/2009/07/african-union-refuses-cooperate-bashir-arrest-warrant-20090706/

reference to the words of the late President Bingu waMutharika at the 2010 AU Summit who stated that,

> To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for so many years … There is a general concern in Africa that the issuance of a warrant of arrest for … al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union charter. Maybe there are other ways of addressing this problem.[266]

It is due to the Al Bashir arrest warrant that African states who are party to the ICC have called for the amendment of the Rome Statute to confer immunity to sitting heads of state.

Outside its attacks on the ICC, the African Union at a meeting of its Heads of State, adopted the Malabo protocol. The Malabo protocol was a direct response to the ICC's perceived bias against African States. In terms of Article 46A of the Protocol, "No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."[267] This provision is clearly in conflict with Article 27 of the Rome Statute which does not recognize Head of State immunity.

Some authors have argued that the Malabo protocol is a slap in the face for victims of impunity and shields errant Heads of State who commit war crimes. Endoh describes Article 46A of the Malabo Protocol as follows,

> By implication, the construction of Article 46A bis of the Malabo Protocol prioritizes immunity in the face of impunity by providing the necessary clause through which heads of states and top government officials are shielded from prosecution.[268]

As will be demonstrated in this paper, some African countries have justified their failure to arrest and surrender Al Bashir to the ICC on the basis of African solidarity and the Malabo protocol.

4.3.1 MALABO PROTOCOL

On 27 June 2014, the Assembly of the African Union adopted a protocol on the Amendments to the jurisdiction of the African court to cover international crimes. The decision of the AU to clothe the African court with a criminal jurisdiction brought the issue of overlapping jurisdiction to the surface.[269] Taking the crimes under the jurisdiction of the courts and the fact that large numbers of African states are state parties to the ICC into consideration, many tend to argue that overlapping

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[266] M.Du Plessis (Ibid)

[267] Article 46A of the Malabo Protocol

[268] F.T Endoh, *African Union and the Politics of Selective Prosecutions at the International Criminal Court,* African Journal of International Criminal Justice, Eleven International Publishing.

[269] Prof Dr Gerhard Werle, The African Criminal Court – A Commentary on the Malabo Protocol, *Series: International Criminal Justice Series, Humboldt-Universität zu Berlin, Germany,* 2016. 13

jurisdiction is inevitable and is likely to cause friction for the primacy of jurisdiction.[270] There are two positions on the *rationale* of the establishment of an African Court with a criminal chamber. The first position, which is particularly supported by those involved in the drafting process of the amendment protocol, argues that the establishment of an African Court having a criminal jurisdiction has been motivated by reasons other than the AU's anti-ICC sentiment.[271] The second position on the other hand contends that the decision to expand the jurisdiction of the African Court is a response to the ICC's perceived bias against Africa and the AU, by establishing its own criminal court, is trying to undermine or substitute the ICC.[272]

The ICC's decision to proceed with the case of Al Bashir despite vocal protests from the AU and the UN Security Council's persistent refusal to react to its demands soured the relations between the AU and the ICC.[273] Relations further deteriorated and reached a climax after the AU's demand for the deferral of the case against the current Kenyan President and his deputy was turned down by the UN Security Council. Considering this sequence of events between the AU and the ICC, it appears to convince some that African leaders wish to replace the ICC by creating their own court.[274]

By coming up with the idea of establishing a regional court to deal with international crimes, the African Union has shown that it wants to dissociate itself from the ICC. African states are convinced that the ICC is a useful instrument in the hands of the Security Council to marginalize African states.[275] The prior establishment of the ICC would never hinder the subsequent establishment of a similar court at the regional level. As one author stated, 'there is no tyranny or monopoly of original motive in international law'.[276] The court can legally exist by its own constitutive instrument, independent of the ICC.-African states through their collective nature can establish a court with a criminal chamber based on international treaties allowing states to prosecute and punish international crimes, the Constitutive Act of the AU and customary international law.[277] As such the establishment of an African Court with Criminal jurisdiction, would result in the African states withdrawing from ICC membership. However, the exit would not absolve them from the reach of Security Council powers under Article 13 referrals for as long as they remain members of the UN Charter.[278]

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[270] *ibid*

[271] Max du Plessis, *Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes*, 235 ISS Paper (June 2012), 3.

[272] Bondah Kwabena Tsibo, An assessment of the Malabo Protocol on Impunity in Africa, University of Ghana, 2018. 103

[273] Max du Plessis, T. Maluwa and A. O'Reilly, 'Africa and the International Criminal Court, *Chatham House International Law*, 2013, 8.

[274] *ibid*

[275] A. Abass, Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges, 24 *European Journal of International Law*. 2013, 941–3.

[276] *ibid*

[277] *ibid.*

[278] Zekarias Beshah Adebe, The African Court with a criminal jurisdiction and the ICC: A Case for overlapping Jurisdiction, African Journal of International and Comparative Law, Volume 3, 2016. 418 - 429

4.3.2 The Decision to withdraw from the ICC

In 2017, the Heads of State of the African Union met in Addis Ababa, Ethiopia and passed a resolution for mass withdrawal of their states from the ICC.[279] The Resolution though is not binding and was opposed by countries such as Nigeria and the Gambia. Following the resolution, South Africa, Burundi and Gambia wrote to the UN Secretary General, indicating their intent to withdraw from the ICC Statute. They were motivated by a 2015 resolution of the African Union that granted immunity from ICC prosecution to the heads of state and called out the ICC's "bias against Africa." The resolution was passed against the backdrop of the ICC's arrest warrant against Sudanese President Omar al-Bashir.[280]

South Africa in particular, proceeded to withdraw from the ICC in terms of Article 127 of the Rome Statute citing that the Court was pursuing "regime change".[281] However, after a court application brought by the opposition political party, the Democratic Alliance, the High Court of South Africa ruled that the withdrawal by South Africa was unconstitutional on the grounds that the government had not sought parliamentary approval before notifying the ICC of its intention to withdraw.[282] The High Court however declined to rule on the substantive issue, that is, whether the withdrawal from the ICC itself was constitutional, opting instead to rule on the procedural impropriety of the withdrawal. As a result, South Africa withdrew its Notice of Withdrawal from the ICC.

Burundi withdrew from the ICC statute in 2017, becoming the first country to withdraw from the ICC. It had been a state party of the statute from 2004. In November, 2017, a pre-trial chamber of the ICC authorized the prosecutor to investigate serious crimes, including killings, torture, rape, enforced disappearances and persecution, allegedly committed in Burundi from April 2015 October 2017. This was the clear motivation for Burundi's withdrawal.[283]

To make matters worse, other non-African states have also withdrawn from the Rome statute. The first such instance was by the United States. In 2002, the Bush administration "unsigned" the statute by informing the UN Secretary General that the US did not intend to ratify the statute and hence had no legal obligations arising from it.[284] This was followed by Russia's 'unsigning' in 2016, triggered by the ICC Prosecutor's report of preliminary investigations, including the Russian forces' alleged crimes committed in Ukraine and Crimea.[285]

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[279] https://www.bbc.com/news/world-africa-38826073

[280] African Union Backs Mass Withdrawal from ICC, BBC NEWS (February 1, 2017); Gwyneth Gamble, African Union Leaders Back Leaving ICC, PAPER CHASE (February 1, 2017).)

[281] https://www.bbc.com/news/world-africa-39204035

[282] Democratic Alliance v Minister of International Relations and Co-operation Case No. 83145/2016

[283] Situation in the Republic of Burundi*:* ICC-01/17

[284] Tim Hillier Sourcebook on Public International Law, Oxford University Press, 2015. 288.

[285] *ibid*

The Philippines had ratified the ICC statute in 2011, but withdrew from it in March 2018, weeks after the ICC prosecutor announced a preliminary examination into the commission of atrocities during the "war on drugs" campaign. The withdrawal was seen as its attempt to shield President Duterte the chief architect of the brutal campaign from a possible investigation by the ICC.[286]

In March, 2021, the Philippines Supreme Court dismissed a petition challenging the withdrawal from the ICC Statute. However, the full bench of the country's Supreme Court, in a judgment delivered in March, 2021 said that despite its withdrawal from the ICC, the international court could prosecute government actors for alleged crimes committed prior to the withdrawal and that the country is obliged to cooperate with the ICC for the same.[287]

These examples illustrate that state acts of withdrawal from the ICC are mostly motivated by ICC's allegations against their nationals, particularly those who are or were political leaders, with commission of ICC crimes.[288] Withdrawal prior to ratification of the ICC treaty is symbolic in nature with no substantial legal consequences. However, all withdrawals convey a clear message to the global community of the concerned states' intention *not* to cooperate with the ICC.[289]

Russia and the United States have both withdrawn from ICC membership. Russia's withdrawal in particular, was triggered by an impending investigation into its military operations in Ukraine.[290] However, both countries continue to interfere with the operations of the Court by instigating investigations and prosecutions of African states. They themselves have lost confidence in the Court, hence they withdrew from it but they continue to subject African states to the same Court.[291] The referral of African states to the ICC by the Security Council is not premised on justice or the maintenance of international peace but it is a political gimmick aimed at furthering the political and economic interests of the big powers.[292]

4.3.3 THE PROPOSED AMMENDMENT TO ARTICLE 16

The AU convened meeting of African States in June and November 2009 respectively. The contentious issues raised involved the controversial role of the UN Security Council in the investigation, prosecution and enforcement of the Rome Statute. There seemed to be consensus that the Security Council enjoys unfettered power and same should be restructured. At these meetings, it was recommended that Article 16 of the Rome Statute be amended to allow the UN

[286] Alexander Loengarov, State of Investigation? The International Criminal Court and the Situation in Palestine, Policy Watch 3526, 26 August 2021

[287] Courtney Hillebrecht. Saving the international justice regime: Beyond Backlash Against International Courts. Cambridge University Press. 2021

[288] Bruce Broomhall. *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, 2003. 131.

[289] *ibid*

[290] Ademola, The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court. Texas International Law Journal, 2005. 78 -90

[291] *ibid*

[292] *ibid*

General Assembly to interfere with a deferral if the Security Council fails to act within a reasonable time period.[293]

At these meetings, seven recommendations were adopted. Those recommendations are important because they highlight governmental views on vexing questions regarding international criminal justice generally and the Court's ongoing work in Africa in particular. For instance, the tension and interplay between peace and justice; the conflicting obligations for states parties to the Rome Statute arising from the substance of Articles 27 and 98; the role of the Council; the question of determining an act of aggression for the purposes of prosecution under the statute, etc.[294] These recommendations highlight the concerns underpinning the ICC's selective practice in Africa. One of the recommendations adopted by the African states read as follows:

Recommendation 3: Deferral of Cases: Article 16 of the Rome Statute

Article 16 of the Rome Statute granting power to the [UNSC] to defer cases for one (1) year should be amended to allow the General Assembly of the United Nations to exercise such power in cases where the Security Council has failed to take a decision within a specified time frame, in conformity with UN General Assembly Resolution 377(v)/1950 known as "Uniting for Peace Resolution," as reflected in Annex A.[295]

What the recommendation proposed was that Article 16 of the Rome Statute be amended to dissolve the absolute power given to the Security Council under the same Article by conferring some of it to the General Assembly. The Security Council would still enjoy its deferral power but same would be exercised alongside the General Assembly. African states proposed that the amended Article 16 should read as follows:

Article 16: Deferral of Investigation or Prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

A State with jurisdiction over a situation before the Court may request the UN Security Council to defer a matter before the Court as provided for in (i) above.

Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under para. 1 consistent with Resolution 377(v) of the UN General Assembly.[296]

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[293] Decision on the Report of the Second Meeting of States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/8(XIV), 2, 16th Ordinary Session, Addis Ababa, Jan. 25–29, 2010

[294] *ibid*

[295] *Report of the 2nd Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)*, AU Doc. No. Min/ICC/Legal/Rpt. (II), Nov. 6, 2009.

[296] *ibid*

Upon closer analysis, it can be argued that the prosed amendment of Article 16 would give a simplistic interpretation. For what it's worth, it greatly minimizes the extent and depth of the AU's anxiety over the interplay between peace and justice.[297] In addition, African concerns about the Council's deferral role ultimately go back to the uneasy political compromise crafted into the provision that became Article 16. As one respected international law scholar has emphasized, most States were opposed to the deferral idea at Rome because of their trepidations over UNSC involvement in its use. Professor William Schabas therefore wondered whether such a deferral power might not have been more politically acceptable for many States had it instead been conferred on the UN General Assembly (rather than the Council).[298]

The suggested amendment to Article 16 shows that African states are not opposed to the Court per se but to the manner in which the UN Security Council instrumentalizes the court at the expense of African countries. Suffice to note that African states are the second largest regional grouping among state parties to the Rome Statute with more than half of them having ratified the Rome Statute.[299] This shows that they subscribe to the notion of international criminal liability and ascribe to the idea of the ICC. What African states are thus advocating for is the decentralization of the UN Security Council's unfettered powers to interfere with the investigation, prosecution and enforcement of the Rome Statute.[300]

4.4 IMMUNITY OF HEADS OF STATES

There are certain procedures provided for under the Rome Statute in respect of the establishment of jurisdiction by the Court. Several indictments issued by the ICC raises fundamental legal issues in respect of whether the Court is competent or not to indict a sitting head of state.[301] This is so because under customary international law, sitting heads of state enjoy immunity from prosecution for as long as they are in office. Customary international law recognises immunity of every state from the jurisdiction of other states.[302] Old rules of customary international law continue to grant complete immunity for heads of states. Article 29 of Vienna Convention on Diplomatic Relations stipulates that "the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention."[303] In the context of Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet case,[304] Lord Slynn of Hadley considered that the

[297] W Schabas, *The International Criminal Court*, *supra* note 93, at 333
[298] *ibid*
[299] C. B. Murungu, Towards a Criminal Chamber in the African Court of Justice and Human Rights, African Journal of International and Comparative Law, 2017, 32
[300] *ibid*
[301] Steffen Writh Immunities, related problems, and article 98 of the Rome Statute, *Criminal Law Forum Dordrecht,* Volume 12, 2001, 429.
[302]ibid.
[303] The Vienna Convention on the law of treaties, 18 April 1961
[304] (On appeal from a Divisional Court of the Queen's Bench Division). ON 25 November 1998 http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd981125/pino02.htm (accessed 14 May 2022).

Convention was drafted to include heads of states.[305] Mark Lattimer and Philippe Sands are of the opinion that:

> "…the ancestor of all immunities of the head of state is sovereign immunity, which seems to have existed before state came into existence, and that granted to the person of the sovereign-the King, the Emperor, the Chief."[306]

State immunity is two pronged. On the one hand it comprises *ratione materiae.* This allows a state to carry out its functions without any interference from other states. In the case of United States of America v. Noriega,[307] the United States District Court for the Southern District of Florida concluded that "leaders are free to perform their Governmental duties without being subject to detention, arrest or embarrassment in a foreign country's legal system."[308] However, in the same vein, the United States Court of Appeals, Second Circuit believed that "there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law."[309] That is to say, the incumbent official enjoys immunity for all acts performed in his official capacity, and immunity is limited to the acts carried out in the exercise of legitimate state functions, and lasts as long as the incumbent holds office and ends when he leaves office.[310]

The other leg of state immunity comprises *ratione personae*. This entails absoluteness and relates to a head of state. It ensures both the functionality and dignity of the state. This immunity is supposed to be eternally attached to heads of states.[311] Customary international law theorises the immunity of a head of state around the fact that he was a sovereign who by *raison d'être* of personal dignity and respect ought not to be impleaded in other states.[312] In the context of the *Pinochet* case, Lord Slynn of Hadley contextualised the *Duke of Brunswick* case,[313] as follows:

> "A foreign Sovereign, coming into this country cannot be made responsible here for an act done in his Sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of

[305] Ibid

[306] Mark Lattimer and Philippe Sands Justice for crimes against humanity, Hart Publishing, 200376.

[307] 746 F. Supp. 1506 (S.D. Fla. 1990). http://law.justia.com/cases/federal/district-courts/FSupp/746/1506/1757098/ (accessed 14 May 2022).

[308] Ibid.

[309] Id. Para. 16.

[310] Bruce Broomhall, ibid p132

[311] Qasaymeh A "Challenges posed by article 13(b) of Rome Statute in the context of the inherited immunity of head state in office" (2013) Diplomatic Centre, Doha https://plus.google.com/+Dcss-qa/posts/L9Mv4yeELD9

[312] The *Pinochet* case. *N60, supra*

[313] *Duke of Brunswick v the King of Hanover* (1848) 2 H.L. Cas.1.

his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign."[314]

The issue of the exercise of the International Criminal Court's jurisdiction over sitting heads of state is one of the major bones of contention in the tense relationship between the ICC and Africa.[315] These disagreements stem from two provisions of the Rome Statute, that is, Article 27 (2) and Article 98(1) of the Rome Statute. Article 27 (2) holds that no immunities or special rules of procedure bars the Court from exercising its jurisdiction owing to the official capacity of any person.[316] The African cases constitute the litmus test with which the analysis of these rules of the Rome Statute can be carried out to clarify the scope and purport of these two provisions.[317]

African states hold on to their sovereignty. This is influence by their colonial history. After having attained independence from colonial rule, most African states attained a new independence that they are determined not to lose. For African states, being sovereign entails having the rights and obligations afforded to states under customary international law. From this perspective, sovereignty for African counties is centered on the right to non-intervention. This means that no state may interfere in the internal affairs of another state. The Westphalian definition of sovereignty is that states can do with their territories as they please and no limits could be imposed on the same. Africa subscribes to the notion of self - determination which implies possession of sovereign statehood.[318]

As such, African states feel that the referral and deferral processes exercised by the UN Security Council under the Rome Statute encroaches on their territorial sovereignty. The traditional notion of sovereignty demands that no state may interfere with the internal affairs of another. As such the interference by the Security Council through the referral process under Article 13 (b) of the Rome statute violates the principles of international customary law. Theoretically, it is not possible to create jurisdiction for the ICC over non-state parties to the Rome Statute.

Although the UNSC referrals novel to customary international law, the same can be rationalized by the mandate of the Security Council under the UN Charter, article 25 of the UN Charter stipulates that the UN member states undertook to be bound by the decisions of the Security Council as it acts on their behalf in executing its primary duty of maintaining international peace and security.[319] Be that as it may, it is important to note that the UN Security Council does not supersede international customary law. The referral that is envisaged in Article 13(b) of the Rome Statute does not fall within the ambit of customary international law. What disqualifies the referral

[314] The *Pinochet* case, ibid
[315] C.B. Murungu, note 61, *supra,* at37

[316] A. Abass, Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges, 24 European Journal of International Law (2013), 941–947
[317] *ibid*
[318] *ibid*
[319]Article 24 of United Nations Charter.

practice is that it is not tantamount to settled practice by virtue of the veto powers exercised by the permanent members of the Security Council.

The absurdity that characterizes the relationship between the ICC and the Security Council is worth noting. Only two out of the five permanent members of the Security Council, namely France and the United Kingdom have ratified the Rome Statute. The United States is so much against the Court such that it has entered into impunity or bilateral agreements with 73 countries, by which no USA citizen may be surrendered to the ICC.[320] Hence, it would not be absurd to conclude that the involvement of the UN Security Council in the investigation, prosecution and enforcement of the Rome Statute is by and large dependent on the actions of the permanent members. The circumvention of Rome Statute indicates that the Statute is not generally accepted practice and is not part of general international law.[321]

Therefore, Article 13(b) of Rome Statute infringes sovereignty of a non-state parties to the Rome Statute. Neither Sudan nor Libya are member states of the Rome Statute hence the UN Security Council acted ultra vires when it referred the two sovereign states to the ICC. This owes to the fact that exercising jurisdiction over these states violates the Vienna Convention on the Law of Treaties of 1969.[322] International law is founded on the principle of states equality, hence the two referrals by the Security Council to the Court is contrary to the international law doctrine of equality of states which entails that an equal has no authority over an equal.[323]

4.5 CONCLUSION

The jurisdiction for the ICC does not fit the lens of the customary international law. The inconsistency of the jurisdiction of the ICC with international law undermines the very nature of customary international law.[324] Rome Statute is a drastic change in international law by affirming jurisdiction for the ICC over a sovereign non–state party. It has been argued that the Rome Statute is the expression of the desire of the international community to curb international crimes.[325] However, it is submitted that article 13(b) of Rome Statute in general creates artificial jurisdiction for the ICC regarding non-state party. Moreover, the referral and deferral processes contemplated in articles 13(b) and 16, respectively are very dangerous mechanisms which are predestined to be handled and manipulated by the UN Security Council.[326] This compromises the integrity of the

[320] Daniel D Ntada Nsereko, Triggering the Jurisdiction of the International Criminal Court, African Human Rights Law Journal, 2004. 261

[321] Abass, Ademola "The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court" Texas International Law Journal, 2005. 211

[322] C. Tomuschat and J. M. Thouvenin. The Fundamental Rules of the International Legal Order, Netherlands: Koninklijke Brill NV, 83-98

[323] *ibid*

[324] B. S. Chimni, Customary International law: A Third World Perspective, Cambridge University Press, 2018. 95 -99

[325] ibid

[326] Ken Obura, Duty to prosecute international crimes under international law in Chacha Murungu and Japhet Biegon (editors) Prosecuting International Crimes in Africa Pretoria University Law Press, 2011. 408=422

ICC and exposes it to be a medium for the double standards approach of the UN Security Council which in its Resolutions relating to referrals, used wording that is inconsistent with the Rome Statute itself.[327]

Exercising the power of referral or deferral by the UN Security Council is highly exceptional, selective and subjugates the ICC to politicisation.[328] The UN Security Council may control the ICC by two means. Firstly, a permanent member may veto the referral; secondly, a permanent member may veto a request for deferral. In this manner, the ICC will be a mechanism of fluctuation from politics to law in international affairs.[329] Therefore, it is safe to say that both articles 13(b) and 16 of Rome Statute, unnecessarily, extend the power of the UN Security Council in contrast with the spirit of the UN Charter.[330]

Many commentators expressed the view that the ICC has been created to deal only with Africa in a slavery colonial fashion.[331] Omar Al-Bashir dismissed the allegation of war crimes charge against him as a colonial plot against his country.[332] The Arab League and the AU have joined Sudan in warning against the ICC becoming "politicised".[333] Mahmood Mamdani claims that, "in its present form, the call for justice is really a slogan that masks a big power agenda to recolonize Africa."[334]

The UN Security Council's interference with the function of the ICC fundamentally depends on the actions of the permanent members.[335] In the Sudanese matter, some critics raise concerns that external political factors, unrelated to matters of law or fact, have led the International Prosecutor to this determination.[336]

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[327] *ibid*

[328] Rod Rastan "The power of the Prosecutor initiating investigation" (February 3 2007) A paper prepared for the Symposium of the International Criminal Court, Beijing.

[329] Robert Cryer "Sudan, Resolution 1593, and International Criminal Justice" 19 (2006) *Leiden Journal of International Law* 196.

[330] *ibid*

[331] Max du Plessis, n33, *supra-201*.

[332] Independent "Al-Bashir dismisses ICC charge as colonial plot" Thursday March 05 2009 http://www.independent.ie/breaking-news/world-news/africa/albashir-dismisses-icc-charge-as-colonial-plot-1662512.html (accessed 14 May 2014).

[333] Arab League, AU warns against politicizing the ICC 12.07.2008 http://www.dwworld.de/dw/function/0,,12215_cid_3479777,00.html?maca=ennewsisfree_englishnews-25-rdf (accessed 14 May 2014).

[334] Mahmood Mamdani (2010) at 6.

[335] Abass, Ademola (2005) at 271.

[336] Andrew T. Cayley "The Prosecutor's strategy in seeking the arrest of Sudanese President Al Bashir on Charges of Genocide" Vol 6 No 5 (2008) *Journal of International Criminal Justice* 830.

CHAPTER 5 – CONCLUSION AND RECOMMENDATIONS

In this chapter, the findings in the dissertation are summarized, and suggestions are put forward regarding future research, and policy recommendations. The main objectives of this research are to expose the politicization of the ICC by the UN Security Council and to assess the justification, if any of the referral and deferral powers afforded to the UN Security Council under the Rome Statute. More importantly, the significance of the role of the Security Council in the investigation, prosecution and enforcement of the Rome Statute is considered.

In Chapter 2, it was found that the ICC enjoys a close relationship with the United Nations to such an extent that a Relationship Agreement was entered into and forms part of the Rome Statute. More particularly, the ICC has a special relationship with a specific organ of the United Nations namely, the UN Security Council. The Security Council has a special mandate under the UN Charter of maintaining international peace and security and in its execution of this mandate, it is empowered under Article 13(b) of the Rome Statute to create special or universal jurisdiction for the court even over nationals whose states are not party to the Rome Statute. It is further empowered under Article 16 of the Rome Statute to suspend investigations and prosecutions that would have been commenced or about to be commenced by the ICC prosecutor. What became apparent in Chapter 2 is that the involvement of the Security Council in the operations of the Court takes away its judicial autonomy and discretion. The Court ceases to be an independent body as it is interfered with and politicized by the Security Council. Apart from taking away the Court's independence, the involvement of the Security Council also brings into play issues of enforcement of the Rome Statute. Non-party states do not have a responsibility to co-operate under treaty law but when an Article 13(b) referral takes place, they are compelled to cooperate and this encroaches on their sovereignty. Further, states have refused to co-operate with the ICC in executing warrants of arrests and the Security Council has not assisted the Court in this regard. In essence, it is clear that the involvement of the UN Security Council in the investigations, prosecutions and enforcement of the Rome Statute compromises the legitimacy of the Court.

In Chapter 3, it was clarified that the Security Council referrals under Article 13 (b) of the Rome Statute are indeed selective. The Security Council has since the establishment of the ICC only referred two African states to the Prosecutor and both these countries are not parties to the Rome Statute. While it may be admitted that the Security Council does have the power to refer situations in its fight against impunity, the question that boggles the mind is whether it is only two states that have committed international crimes warranting referrals to the ICC. What is clear is that the Security Council has turned a blind eye to other states that have committed atrocities warranting investigations by the Prosecutor. Examples of Burma, Syria and Russia were discussed in Chapter 3. This conduct by the Security Council leaves a lot to be desired and exposes its political motives in so far referrals are concerned. Suffice to note that the referrals were coupled with reservations which indemnified nationals of other states who had committed the same offences as the nationals of the referred countries. As such, it is clear that the referrals themselves were selective and targeted special people while providing immunity to other people. This is unbecoming of an

international organ that has vast power to influence the operations of an international court. Being a political body, the Security Council is driven more by politics than justice.

Chapter 4 exposed both the Court and the UN Security Council's bias towards Africa. While the Court's selectivity is justified by reason of its lack of resources, it has failed to exercise impartiality in its prosecutions. It is common cause that the ICC cannot investigate or prosecute every matter brought to it but only those whose evidential weight is sufficient to prove a case. In this regard, the ICC is selective and it is acceptable. What is unacceptable however, is showing a particular interest in one continent namely Africa. Ninety percent of the ICC prosecutions involve African countries. The only two referrals by the Security Council involve African counties. It would be absurd to assume that American and European countries do not commit international crimes and it is only Africa that has an unprecedented rate of international crimes warranting international adjudication. This selectivity by the Court and the Security Council has prompted African countries to develop a negative attitude towards the ICC to such an extent that the African Union has sought to establish its own African Court with criminal jurisdiction through the proposed Malabo protocol. The African Union has also gone further to instigate the withdrawal of African countries in masses. It is important to note that Africa is not opposed to the ICC per se but it is dissatisfied by the criteria adopted for referrals and prosecutions by the ICC. Africa accuses the Court and the UN Security Council of selectivity in as far as the prosecution of African states is concerned. This accusation is not without basis especially in respect of the Security Council. In as far as the ICC is concerned, it can be counter-argued that most of the African states' prosecutions were referred to the Court by the States themselves hence the Court cannot be accused of selective prosecution. In respect of the UN Security Council however, there exists no justification other than that the selectivity is driven by politics.

The United Nations Security Council is the primary organ responsible for the maintenance of international peace and security while the International Criminal Court is the principal judicial body responsible for the prosecution of international crimes. As such, it is clear that these two organs share a relationship; however delicate. This relationship is indisputably marred with significant challenges and controversies. This need not be the situation. The apparent challenges stem from the limitations placed on the jurisdiction of the Court by the Security Council's referrals. The problem with these referrals is that they lack the requisite support from states and this affects cooperation with the Court in enforcing its decisions.[337] Furthermore, the Security Council does not follow up on the investigations they would have initiated through referrals. It is important that the Security Council follows up on its referrals because failure to do so erodes the progress of the Court. The ICC has limited resources therefore it relies on the Security Council to use its power to advance the cause of justice.[338] The then Prosecutor of the ICC expressed her frustration in the sixteenth report of the ICC on the Sudanese situation when she said the said the following;

[337] Yvonne M. Dutton, Enforcing the Rome Statute: Evidence of (Non) Compliance from Kenya, International and Comparative Law Review, Volume 7, 2016. 54

[338] *ibid*

> "My Office and the Court as a whole have done their part in executing the mandate given by this Council in accordance with the Rome Statute. The question that remains to be answered is how many more civilians must be killed, injured and displaced for this Council to be spurred into doing its part?"[339]

Therefore, it is clear that the ICC requires support from the Security Council especially on the enforcement of warrants of arrest. The warrant issued by the Court in the two situations that were referred by the Security Council remain outstanding. This is as a result of lack of follow ups by the Security Council and failure to act in respect of enforcement of the warrants. The Security Council is therefore called upon to support the ICC by enforcing its decisions especially for cases that it would have initiated itself through referrals. Failure to do so affects the legitimacy and proper functioning of the Court.[340] It would promote the effectiveness of the Court if the Security Council came up with enforcement policies for the execution of warrants of arrest and the enforcement of the Court's decisions. Penalty provisions for failure to comply with the Court's decisions should also be developed to promote state compliance.

While the Security Council is empowered to take all necessary measures to maintain and restore international peace and security, it ought to come up with guidelines as to what actions constitute a breach of the peace warranting a referral to the ICC as well. The haphazard referral procedure is what has led to accusations of selectivity. It is prudent that criteria be developed for what warrants a referral or a deferral so that it is clear why other states have been referred to the ICC and others have not. Suffice to note that the African Union has requested the Security Council to defer certain situations in the interests of peace. The Security Council just ignored this request without giving any explanation as to why it was not willing to suspend the investigations or prosecutions. As an organ vested with so much power, the Security Council owes it to the international community to give a justification for its decisions. To show such levels of disinterest by ignoring a request without explanation shows that it does not have the interests of peace or justice at heart but is driven by other motives. The Security Council should be accountable for its decisions and should apply consistent standards for referrals.

Another contentious issue is the veto power enjoyed by the permanent members of the Security Council. A referral or deferral can easily be vetoed by any one or more of the permanent members and its adoption would fail. It is important that limits be imposed on the extent to which this veto power may be exercised. Where international crimes that fall within the jurisdiction of the ICC are perceived to have been committed, the permanent members should not be allowed exercise their veto power in such situations. Vetoing such decisions where it has already been established that international crimes were committed is inconsistent with the primary mandate of the UN Security Council of maintaining international peace and security. Furthermore, the Security Council should

[339] Fatou Bensouda, Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, Pursuant to UNSCR 1593 (2005)," speech delivered to the Security Council, December 13, 2012, available at www.icc-cpi.int/iccdocs/PIDS/statements/UNSC1212/UNSCDarfurSpeechEng.pdf.
[340] Yvonne M. Dutton, *supra,* at 59

be more open to exercising its Article 16 powers by deferring investigations or prosecutions. Sometimes this avenue is preferrable in order to give peace a chance. Justice can always be addressed later after peace has prevailed; after all, the Security Council is more concerned with maintaining peace and security above everything else.

In so far as Africa is concerned, the bias towards the continent is more apparent than not. The only way to tackle this bias is by African countries establishing mechanisms to genuinely prosecute their nationals in domestic courts. Suffice to note that the ICC is not a court of first instance, it acts in complementarity to domestic courts. The jurisdiction of the ICC can only be invoked if the local courts have failed or are not willing to prosecute their own nationals in national courts, however, if African states set up proper and functional systems to try their nationals who would have committed international crimes in local courts, the continent would be beyond the ICC's reach. Not even the Security Council can refer a situation to the ICC if the state concerned is able and willing to hold the prosecutions domestically. However, the problem that arises is that African states cling to the notion of absolute sovereignty and the immunity of heads of state. On the contrary, the ICC does not absolve a person from prosecution by virtue of their official capacity. Therefore, African states would never prosecute a sitting head of state for as long as their term is running. For example, section 98 of the Constitution of Zimbabwe absolves the president from criminal or civil proceedings.[341] As such, the president cannot be tried nationally even if he committed international crimes.

The International criminal Court has existed for twenty years. its primary responsibility is to fight impunity and bring to book the perpetrators of the most heinous of crimes without showing any fear, favor or prejudice. It is an independent judicial body and no organ should interfere with its functions. However, the Court does not have the resources to execute some of its functions such as the enforcement of its decisions, execution of warrants of arrest and gathering of evidence without the cooperation from states and the United Nations Security Council. The Court essentially relies on the Security Council for enforcement. The Security Council is obliged to cooperate with the ICC through the Relationship Agreement. However, as a political body that enjoys considerable power to influence the functioning of the Court, the Security Council manipulates its power for political gain. This undermines the legitimacy and integrity of the Court and impedes its effectiveness.

[341] Constitution of Zimbabwe Amendment (No. 20), Act 2013 (Act No. 1 of 2013)

BIBLIOGRAPHY

BOOKS

Ankumah E. A. The International Criminal Court and Africa. Cambridge: Cambridge Intersentia, 2016

Dugard J. International Law: A South African Perspective JUTA, 2010.

K. M. Klarke et al, Africa and the ICC: Perceptions of Justice. Cambridge: Cambridge University Press, 2016

Makaza D. Strengthening the Validity of International Criminal Tribunals. Brill | Nijhoff, 2018

Nyawo J. Selective Enforcement and International Criminal Law: The International Criminal Court and Africa. Cambridge: Cambridge Intersentia, 2017

Schabas W. A, An introduction to the International Criminal Court, 3rd Ed. Cambridge: Cambridge University Press, 2004

JOURNAL ARTICLES

C. C. Jalloha, D. Akandeb, and M. du Plessis, *Assessing the African Union Concerns about Article 16 of the Rome Statute of the International criminal Court*, 2011, Volume 4, African Journal of Legal Studies 90

G. M. Lentner, *The Role of the UN Security Council vis-a-vis the International Criminal Court Resolution and its challenges to International Criminal Justice*, 2011, Vol 14, International and Comparative Law Review 17- 34

V. O. Ayeni and M. A. Olong, *Opportunities and Challenges to the UN Security Council Referral Under the Rome Statute of the International Criminal Court*, Vol 2, No 1, African Journal of International and Comparative Law, 2017. 215-223

A, S. Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, Vol 4, No. 1, European Research Council, 2007. 109

J. J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, Vanderbilt Journal of Transnational Law, Vol 33, 200, 309

Zacklin R, *The failings of ad hoc International Tribunals*, Vol 2, No 1, Journal of International Criminal Justice 2, 2004, 542

S. Writh, *Immunities, Related Problems, and Article 98 of the Rome Statute*, Vol 12, No 3 Criminal Law Forum Dordrecht, 2001, 492.

L. A. Casey and D. B. Rivkin Jnr, *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, Vol 6, No 2, Virginia Journal of International Law, 2004. 64-87

E. Elgar, *The International Criminal Court: A Postcolonial Tool for Western States to Control Africa*, Journal of International Criminal Law, Vol 1, No. 1, 2020, 1196

C. Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, Vol 10, No. 4, Journal of International Criminal Justice, 2005, 698–699

Y. M. Dutton, *Enforcing the Rome Statute: Evidence of (Non) Compliance from Kenya*, Vol 7, No. 2, International and Comparative Law Review, 2016. 54

CASE LAW

The Prosecutor v Ahmad Muhammad Harun ICC-02/05-01/07

The Prosecutor v Omar Al Bashir, ICC-02/05-01/09

The Prosecutor v. Saif Al-Islam Gaddafi ICC-01/11-01/11

The Prosecutor vs Thomas Lubanga Dyilo, ICC, 01-017/21

STATUTES

Rome Statute of the International Criminal Court, 2002

UN - ICC Relationship Agreement, 2004

United Nations Charter, 1945

Vienna Convention on the law of Treaties, 1980